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CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Colorado

AT THE

APRIL AND SEPTEMBER TERMS A. D. 1914,
AND JANUARY TERM A. D. 1915

E. T. WELLS
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

APRIL and SEPTEMBER TERMS, 1914 and JANUARY TERM A. D. 1915

[No. 8300.]

LORD v. THE CITY AND COUNTY OF DENVER ET AL.

1. CONSTITUTIONAL LAW—*Municipal Corporations Contributing to Private Enterprise.*—On May 20th, A. D. 1913, the City and County of Denver adopted an amendment to their charter (§ 355), providing for the creation of a Tunnel Commission, with authority to construct or assist in the construction of a tunnel through the main range of the Rocky Mountains for the transportation of freight, passengers, water, and electricity, and with power to enter into contracts with individuals or corporations for the construction, control and management of the tunnel, and for the future lease, sale or disposition thereof; providing for the issue of bonds by the municipality in $3,000,000 to assist in the expense, and for the annual levy of a tax sufficient for the creation of a sinking fund to discharge such bonds at maturity. Later the Tunnel Commission entered into a contract with a railway company for the construction and equipment of a tunnel, and its approaches, for railway transportation purposes, at the estimated cost of $4,500,000, and ready for the installation by the city of facilities for the transportation through the tunnel of water and electricity; the actual cost of the construction of the tunnel to be paid in the proportion of one-third by the railway company, and two-thirds by the

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city; the railway company paying the annual interest on the bonds of the city, and the entire cost of maintenance, equipment and operation of the tunnel; that other railway companies might use the tunnel and its approaches upon certain terms set down in the contract; and finally for the sale of the tunnel by the city to the railway company, reserving the perpetual right to its use, for the transportation of water and electricity only.

Among other stipulations was a provision conferring upon the city the exclusive right, in perpetuity, to construct and operate, through the tunnel, an acqueduct or pipe-line etc. for conveying water for use by the City and its inhabitants, from the western to the eastern portal thereof, and the right to extend through the tunnel, cables, wires, and other apparatus, for conveying electricity to be used by the city, for power, light and other purposes.

On bill brought by a taxpayer, the amendment of the charter, and the contract pursuant thereto, were held clearly in violation of §§ 1 and 2 of Art. XI of the Constitution, (1) in pledging the credit of the city in aid of a private corporation, (2) in creating a partnership between the city and the railway company; that the reservations in favor of the city had not the effect to change the character of the proposed enterprise in this respect, or relieve it of its infirmities; (3) that the reservation to the city of the right to operate an acqueduct or pipe-line for conveying water from the western to the eastern portal of the tunnel was a mere easement, which the city had no means or right to enjoy, having no water or right to water to be so conveyed; (4) that the reservation of the right to bring electricity was without value, since the electrical current might be obtained elsewhere for a comparatively insignificant sum; (5) that the reservation of the city of the title to all mineral veins discovered was unlawful, in that the city has no power to tax its inhabitants to promote a prospecting contract; that what the reservation contemplated is not within municipal powers; (6) that the reservation to other companies of the right to enjoy the tunnel is within the constitutional prohibition, in that the city has no more power to extend its credit in aid of two or more railroads than one; and because further, the contract provides that the railroad company with which the contract was made should be entitled to exact from every other railway company, desiring to use the tunnel a yearly charge during the fifty years of the life of the contract for its own use, as a condition precedent. (14-33)

Held further, that the contract was invalidated by the provision for the sale of the tunnel by the city to the railway company; that it is not within the ordinary powers of a municipal corporation to construct an improvement, convenience, or necessity, with the avowed purpose to dispose of the same, or an interest therein, to a private person or corporation. *Denver v. Hallett*, 34 Colo. 393, distinguished. (34)

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2. ——*Will of the People.* Where a municipal corporation is proposing to enter into a contract prohibited by the Constitution, the fact that both the legal voters, and the tax payers of the community, have expressed themselves in unmistakable terms, in favor of the project, is of no moment. (24)

And the express declaration in the charter amendment, that the project proposed "will be of local use and convenience to the public, and is essential to the future growth of the city" is equally to be disregarded. (26)

3. ——*Article XX*—§ 1, contains no repeal of the limitation upon the powers of the municipal corporations prescribed by §§ 1 and 2 of Art. XI. (26)

4. CONTRACT—*Construed—Option*—An agreement by one party to sell, and the other to buy, a particular property for an agreed price is not an option but an executed contract. (28)

Error to Denver District Court.—Hon. GEO. W. ALLEN, Judge.

Mr. HARRY S. SILVERSTEIN and Mr. HARRY L. LUBERS, for plaintiff in error.

Mr. I. N. STEVENS, City Attorney, and Mr. HARRY A. LINDSLEY, Mr. JOSEPH C. HELM and Mr. M. H. KENNEDY, of counsel for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This action is by a citizen and taxpayer, to restrain the City and County of Denver from issuing its bonds in the amount of three millions of dollars, to aid in the construction of a proposed tunnel to be known as the "Moffat Tunnel." It seems that a statement of the facts must be extended to an unusual length in order that the matters to be determined may be properly understood.

The questions raised were determined in the court below upon a demurrer to the complaint. The complaint alleges the organization and existence of the City and County of Denver under the XXth article of the Constitution; and that on the 20th day of May, 1913, an amend-

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ment to the charter of the city and county was adopted, known as section 355. This section purported to create a Tunnel Commission, to consist of three members, and at the same election, the members of such commission were elected. Among other things provided by the said amendment, were the following:

> "All the powers granted to the City and County of Denver by Article XX of the Constitution of the State of Colorado, and otherwise existing by operation of law, including the power of eminent domain and authority to make all necessary filings under the laws of the State of Colorado and the United States, are hereby conferred upon said Tunnel Commission, to acquire, construct, build, assist in building and constructing, operate, maintain, lease and dispose of, a transportation tunnel, together with necessary approaches thereto, through the main range or divide of the Rocky Mountains under or near James Peak, to be known as the 'Moffat Tunnel,' for the purpose of transporting freight, passengers, water and electricity, or for any one or more of such purposes; *provided,* however, that in the event said tunnel shall be originally constructed for the transportation of freight and passengers, the right shall be retained by the City and County in perpetuity, to construct and operate, or to authorize the construction and operation, through such tunnel, of an aqueduct, pipe line or other apparatus for conveying water from the western to the eastern portal, for use by the City and County of Denver, and its inhabitants for domestic purposes, irrigation, power or other uses; also the right to extend or authorize the extension through the same, of cables, wires or other apparatus for conveying electricity manufactured west of the western portal thereof, to be used for power, lighting or other purposes, by the city and its inhabitants; and to permit the use thereof, upon some fair and equitable basis, by any and all railway lines desiring such use; but in enlarging said tunnel or otherwise preparing it for, and subjecting it to the said water or electric uses, the original use to which it shall have been subjected, shall not be destroyed, impaired or needlessly interrupted.

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And if in constructing said tunnel, mineral in paying quantities shall be discovered therein, the commission shall have power to make such contracts and take such other steps in relation thereto as will secure for the city and county, the benefit of such discovery or discoveries.

"The construction, management, operation, lease and sale or disposition of said tunnel and its subjection to the transmission of water and electricity, shall be in the exclusive control of said Tunnel Commission, including the disbursement of all funds provided in connection therewith.

"The commission shall institute and defend all litigation affecting its duties or powers or arising from the exercise thereof, or in relation to its trusts, and all expenses of such litigation shall be paid by the treasurer, out of the General Fund upon the warrant of the commission.

"The commission may also provide that a portion of the funds needed for construction of the tunnel may be furnished by individuals or corporations interested in the same, and may enter into contracts with such individuals or corporations interested in the same, and may enter into contracts with such individuals or corporations with reference to the construction, control, management, operation and future lease, sale or disposition of the same; provided always, that until the city and county shall have been reimbursed in full for any and all moneys so expended by it, together with interest thereon, and is released from all financial liability in connection therewith, it shall retain the ownership of said tunnel and the right to regulate and control the same itself, or by its representative or agent, or by contract as hereinbefore provided.

"And *provided* further, that the rights in and to said tunnel hereinbefore reserved to the city and county in perpetuity, shall be perpetually retained, notwithstanding any lease, sale or other disposition of said tunnel or its use. If upon investigation the commission shall decide that said tunnel is desirable and its construction feasible, that body shall determine the amount of general bonds of the city

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and county necessary to be issued, and the rate of interest the same shall bear per annum; and the commission may by ordinance of the city council, submit to the vote of the taxpaying electors, at any time, at any election held in the city and county, after the adoption of this amendment, for whatever purpose such election may be called, whether such election be general or special, or at a special election called upon their request for the purpose, the question of whether the city and county shall issue its general bonds maturing in not less than fifteen, nor more than fifty years for such purpose, in such amount, and at such rate of interest as has been determined by said commission; and the council shall pass the necessary ordinance to call said election at the time so fixed by said commission, and the Clerk and Election Commission shall publish the necessary notices for calling and holding said election at the time so fixed, and they and all other officers, shall perform the duties incumbent upon them by law for the legal holding of said election.

"The commission may also submit any proposition concerning its powers or trust at any municipal election. All propositions shall be submitted in the way, at the time, and in the manner and form prescribed by said commission.

"When there is so submitted to the taxpaying electors the question of incurring a general indebtedness of the city and county, for the foregoing purpose, if a majority of the votes cast thereon shall be in favor of the proposition so submitted, it shall thereby be adopted, and such adoption shall be a sufficient authorization for the issuance of the bonds in the amount thereby provided for, and maturing on the date therein fixed, and the same, when issued, shall be and constitute a valid general indebtedness of the City and County of Denver for said purpose, and the provisions of this section relative to the issue, sale and redemption of bonds, shall apply thereto; the vote upon such election shall be canvassed and the result declared by the proper officers as provided by law.

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"The council shall pass such ordinance as said commission shall deem necessary respecting the issuance of said bonds, or to the full exercise of all the powers herein given it, in the form recommended by the commission and without amendment, and the Mayor shall sign the same.

"The City and County of Denver shall annually levy a sufficient tax for the creation of a sinking fund to discharge in full the principal of, and interest on, the bonds issued hereunder, unless the ordinance adopted, as hereinabove provided, shall contain suitable provisions otherwise to insure the prompt payment of said interest as the same shall become due, and also for the creation of a sinking fund sufficient to discharge in full the principal of said bonds at maturity.

"This section and any provision of the charter referred to herein shall remain in full force, so far as may be necessary for the purpose of securing the prompt payment of the bonds issued hereunder, and until said bonds are fully paid shall be irrepealable.

"The inhabitants of the City and County of Denver by the adoption of this charter amendment do find and declare that the said tunnel, will in their judgment, be of local use and convenience to the people, and that it is also absolutely essential to the future growth and welfare of said city and county."

It is then alleged that the tunnel commission so created, proceeded to determine and did determine, the approximate cost of the tunnel, together with the necessary approaches thereto, through the main range or divide of the Rocky Mountains, under or near James Peak, and for that purpose the same could be constructed for not to exceed $4,420,000, and that acting under the authority assumed to be conferred, by the city charter amendment, the commission on the 8th day of October, 1913, entered into a written agreement with the Denver and Salt Lake Railroad Company, for the construction of such tunnel.

This agreement recites that the railroad company owns and operates a railroad from the City of Denver

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to Steamboat Springs, Colorado, and is engaged in the extension thereof to Craig, Colorado, and shall be further constructed and extended to Salt Lake City, Utah; that the railroad company desires to use, lease, operate and maintain and ultimately to acquire, the said tunnel, for railroad and transportation purposes, subject to the city's use for conveying water and electricity, and the city's power and control over said tunnel for the purpose of assuring fair and equitable rates to other railroads using said tunnel; and that in consideration of the premises, the railroad company is willing to grant the use of its tracks for the distance of thirty miles east of the eastern portal of said tunnel, and for a distance of seventy-five miles west of the western portal of said tunnel in perpetuity, to other railroads desiring to use the tunnel, on the terms and conditions afterwards provided in the agreement; that a survey has theretofore been made by the Continental Tunnel Railroad Company, and rights of way have been secured by said company, in the land office of the United States for the location of the proposed tunnel.

It is then agreed that in pursuance of the power conferred by the said charter amendment, the tunnel commission will procure the services of engineers of experience, in the construction of the proposed tunnel, and fix the compensation to be paid such engineers, and that this payment shall be made from the funds provided for the construction of the tunnel; or in case of failure of the city to vote the bonds provided in the agreement, that the railroad company shall pay one-third, and the tunnel commission two-thirds of said expenses; that an estimate of the costs of the tunnel shall be made by the engineers, and which tunnel shall be adapted for and with a single-track railroad, having an inside clearance of not less than sixteen feet in width, and not less than twenty-one feet in height, and suitable for said city's use not only for railroad transportation purposes, but also for the conveyance of an ample supply of water for domestic and irrigation purposes, and electricity for power and

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lighting purposes for the City and County of Denver, and the inhabitants thereof, and which said tunnel shall have grades not exceeding two per cent cut for railroad purposes.

The tunnel commission further agreed, that in case the engineers report the probable cost of construction of the tunnel and the approaches, ready for the installation of facilities for the transportation of water and electricity for use by the City and County of Denver, and ready for the electric operation of a single-track railroad, shall be $4,500,000 or less, then the tunnel commission shall undertake the construction, building and completion of said tunnel, approaches and stationary railroad facilities, and provide and pay $3,000,000 by and through the issuance of general bonds of the City and County of Denver, to be issued in accordance with the amendment; such bonds to bear interest at not more than five per cent per annum, interest payable semi-annually, and shall be payable fifty years after their date.

It was also provided for the retirement of such bonds and the creation of a sinking fund. It was then agreed by the commission that if the probable cost reported by the engineers did not exceed $4,500,000 and if the lowest satisfactory bid confirms such estimate, that the tunnel commission shall build said tunnel upon conditions that the railroad company shall pay the entire excess of costs over and above the sum of $3,000,000; further, that the payments required by the railroad company shall be deposited as thereafter agreed, and that the consideration of such payments, together with the right to use the tracks of said railroad company, are for an option provided for in the agreement, by which the railroad company is granted the right to use, lease, operate, and maintain, and ultimately to acquire the said tunnel from said tunnel commission, as provided in the agreement. The tunnel commission was to institute and defend all litigation affecting its duties and powers, or arising from the exercise thereof, or relating to the administration of its trusts, and to exercise the power of

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eminent domain, and all of the expenses therein incurred, are to be included as a part of the costs of the tunnel.

The tunnel commission further agreed that the railroad company may at any time purchase said tunnel for railroad transportation purposes, upon the payment by the railroad company, of the $3,000,000 of the bonds provided for, or so much thereof as may be sold for the purposes thereof, with all accrued interest, and that the title of the said tunnel and its approaches, shall thereupon immediately vest in the railroad company. The tunnel commission is, on demand of the railroad company, to execute and deliver to the railroad company, such other and further assurance of title as may be necessary in the premises; subject, however, to a perpetual easement in the city for the transmission of water, and electric current for light, heat and power, and also subject to the perpetual right reserved by the city and county, to have said tunnel equipment and approaches, and tracks of said railroad for a distance of thirty miles east of the eastern portal and for a distance of seventy-five miles west of the western portal, used by other railroads, as provided in the agreement.

The railroad company agreed that if the estimate of the engineers for the reasonable cost of said tunnel, necessary approaches and stationary railroad facilities, ready for laying of pipes and the installation of facilities for the transportation of an ample supply of water for domestic and irrigation uses, and of electricity for power and lighting purposes, for the City and County of Denver, and including said single-track railroad, to be $4,500,000 or less, then one-third of said estimate costs of construction, building and completion of said tunnel, approaches and facilities shall be deposited by said railroad company, concurrently with the two-thirds thereof deposited by the tunnel commission.

The railroad company further agreed that the tunnel commission should build and construct the tunnel, necessary approaches thereto, and facilities for trans-

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portation of water and electricity as aforesaid, including said single-track, and that the railroad company should pay any excess of cost above the said sum of $3,000,000.

It was also agreed that the title to the said tunnel and its necessary approaches, shall be vested in the City and County of Denver, and shall remain the property of said city and county, until the same shall have been purchased and fully paid for by the railroad company.

It was further agreed that the railroad company should pay the interest on all the bonds to be issued and sold by the city, so long as any such bonds are unpaid and outstanding, plus one per cent per annum on all said bonds outstanding, to comply with the sinking fund for the provision of the retirement of said bonds, and should also pay the entire cost of maintenance, equipment and operation of said tunnel, including the necessary motive power.

The railroad company further agreed to provide trackage rights for the use of said tunnel and its approaches by other railroads under fair and reasonable trackage agreements containing the usual proper covenants and conditions customarily embodied in trackage agreements between railroads, and upon condition that each other railroad desiring to use the said tunnel and its approaches, may do so only upon payment of one-half of the interest upon the actual cost of construction and equipment of the tunnel, and its approaches, on a basis of five per cent of all sums paid by the constructing parties, for construction and equipment and motive power of said tunnel and its approaches, together with such proportion of the cost of maintenance and operation of said tunnel and its approaches, as the number of car wheels of each road so using said tunnel, shall bear to the total number of car wheels passing through said tunnel.

The railroad company further agreed to furnish at its own cost, and to provide all electric current necessary for the operation of the tunnel and its approaches, and to supply all the necessary equipment, including mo-

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tive power, for the operation of the tunnel. The railroad company further agreed to permit to the railroads having trackage rights to the use of the tunnel, to use its tracks and facilities for a distance of thirty miles from the east portal, and seventy-five miles from the west portal, *provided* that any such railroad so using the tracks and facilities, shall pay interest at the rate of three per cent per annum based upon the reasonable cost of reproducing the tracks so used, at the time of acquiring the right of way, and that each railroad shall in addition, and as a condition precedent, pay to the railroad company for maintenance and repairs, a percentage of the actual cost thereof based upon the car wheels estimate. The railroad company further agreed that it would on or before the maturity of the bonds of the city, exercise its option to purchase said tunnel by the payment of the principal of the $3,000,000, or so much thereof as may have been sold.

It is further agreed by the railroad company, that it will immediately, upon the beginning of the construction of the tunnel, proceed in the construction of its lines from Craig, Colorado, toward the Colorado and Utah line, and will within five years from the date of the completion of the tunnel, have its lines fully and continuously in regular, daily operation to the City of Salt Lake.

It was also agreed between the parties, that before any contract is let for the construction of the tunnel or any part thereof, the tunnel commission shall deposit with a depository to be agreed upon, $3,000,000 of bonds of the City and County of Denver, and that the railroad company will deposit with the said depository, its proportion of the total cost of the said tunnel in cash or current marketable securities so deposited, to be sold by the party so depositing as it may desire, and all proceeds to be deposited with the depository.

It was mutually agreed further, that the money so deposited by the contracting parties shall be paid out in the same ratio or proportion, as the total amount furnished by the parties shall bear to each other.

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It was further mutually agreed that the exclusive right shall forever be reserved in perpetuity in the City and County of Denver, "to construct and operate through said tunnel, an aqueduct, pipe line, or other apparatus for conveying water from the western to the eastern portal, for use by the said City and County of Denver, for domestic, power, and other purposes, also the right to extend through the same, cables, wires and other apparatus for conveying electricity, to be used for power, light and other purposes by the city; subject to the conditions that all installation of equipment and use of said tunnel and approaches for the purposes aforesaid, shall not destroy, impair, or unreasonably interrupt the uses of said tunnel for said railroad purposes."

It was further agreed that the tunnel commission shall take such steps as may be permissible under the existing laws, or by procuring appropriate legislation, as will secure exclusively to the city, the benefit of any or all veins of mineral, or mineral deposits, that may be discovered in constructing the tunnel, provided that no mining operations or mining development shall, at any time or in any manner, interfere with, impede, endanger, or destroy the use of said tunnel or its approaches for transportation purposes. All funds were to be paid out upon order of the tunnel commission. Contracts were to be let by bid, the tunnel commission to reserve the right to accept or reject any such bids.

It was also provided, that upon completion of the tunnel and its approaches, the railroad company should be entitled to the possession and operation of the same for railroad transportation purposes, such possession and operation being subject to the use, rights and easements reserved to the city.

It was further agreed that the cost of the special election to determine the question of issuance of the $3,000,000 bond issue, shall be paid, one-half by the city, and one-half by the railroad company. It was likewise provided that in case of failure of the railroad to pay the interest on the outstanding bonds of the city, or to

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deposit the one per cent sinking fund as provided, or failure in any other of the material provisions of the contract for a period of three months, then the tunnel commission may declare the contract terminated and all sums paid by the railroad company shall be held as liquidated damages.

The complaint further alleges that after the execution of this agreement the question of the issuance of $3,000,000 in bonds, was properly submitted and adopted.

There are but two questions presented for determination: 1. Is the issuance of the bonds by the city and for such a purpose, inhibited by the constitution; 2. If not, then is the provision of the contract and proposition to issue such bonds extended for the full period of fifty years, in contravention of sec. 8, art. XI of the Constitution limiting the period for the extinguishment of a city debt to fifteen years.

Sections 1 and 2 of art. XI of the Constitution provide:

> "Sec. 1. Neither the state nor any county, city, town, township or school district, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of any person, company or corporation, public or private, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.
>
> "Sec. 2. Neither the state nor any county, city, town, township or school district, shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or a joint owner with any person, company or corporation, public or private, in or out of the state, except as to such ownership as may accrue to the state, by escheat or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the state, or to any county, city, town, township or school district, or to either or any of them, jointly with any person, company or corporation, by forfeiture or sale of real

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estate for non-payment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fines, penalties or forfeiture of recognizance, breach of condition of official bonds, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested."

Prior to the adoption of our constitution, the policy of extending public aid to private corporations, had grown to be alarming. Judge Dillon in his work on Municipal Corporations, 1 Dill. § 313 and 318, points out the evil effects arising therefrom. This policy he suggests had become a mania, particularly in the west; that it had resulted in attempted repudiation upon the part of both states and municipalities, and says:

"The most noted of extraordinary or extra-municipal powers conferred upon municipal and public corporations, is the authority to aid in the construction of railways by subscribing to their stock, issuing negotiable bonds as a means of paying their subscription, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred * * * regarded in the light of its effects, whatever may be thought of its constitutional soundness, there is little hesitation in affirming that this invention to aid the enterprise of private corporations has proved itself baneful in the last degree."

To prevent this evil, there began the adoption of constitutional amendments by many of the states, denying the right of the legislature to grant such powers. Our constitution was adopted at a time when the subject was much in the public mind. An examination of the proceedings of the constitutional convention shows the introduction of several resolutions upon the subject, and repeated re-drafts of these sections, with the result that sections 1 and 2 of art. XI are broader in scope, and more specific in the matter of restriction, than any similar constitutional provision considered or brought to

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our attention. Indeed, it would seem that language could not make plainer the intent of the framers of the constitution, to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever.

These sections of the constitution have been before this court, for interpretation at least, as to the spirit and intent. The case of *C. C. R. R. Co. v. Lea,* 5 Colo. 192, was decided within a very short period after the adoption of the constitution. Two of the three judges, then constituting the Supreme Court, had served as members of the constitutional convention. The question of public benefit was urged in that case, as here. It was there said:

> "That the construction of the proposed line of railroad would be of great benefit to the county and its citizens; that it would give them increased and superior facilities for traffic and commerce with both the Atlantic and Pacific seaboards, do not make it any the less a donation within the intent of the inhibition.
>
> "These and similar considerations of public benefit and advantage, had constituted for years, under our territorial government, the basis of appeals for and grants of county and municipal aid to railroad companies, and it was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription, no matter what might be the public benefit and advantages flowing from the construction of such roads. I understand the framers of the Constitution and the people who adopted it, to have intended by this provision the declaration of a broad policy of prohibition, forbidding state, county and municipal aid to railroad and other companies in any of the modes specified.
>
> "If the existence of a public benefit is to give such an agreement, the character of a sale of the stock, and take it out of the constitutional prohibition, then the prohibition is utterly nugatory and

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valueless, as such consideration would exist in every probable case."

Speaking of the sections of the Constitution under consideration and other provisions in restriction of authority to incur public debt, in the case of *People ex rel. v. May,* 9 Colo. 80, 10 Pac. 641, it was said:

> "It was their duty not only to provide against the recurrence of evils, patent and already experienced, but also to guard every point where abuses were liable to creep into the administration of public affairs. The waste, extravagance, frauds, peculations, defalcations and tax burdens, disgracing and incumbering the administration of American municipalities, county, town and city, had long been national topics of discussion, written about by publicists, denounced by the press and resolved about by political parties, and were known to the country at large. The effect of this was to make the honest and economical adminstration of affairs, whether town, city, county or state, practically the most important question that came before the convention."

It may be well to consider briefly the material facts as presented by the record. The railroad company owns and operates a railroad, beginning in the City of Denver and extending westward and over and beyond the range of mountains, through which the tunnel is proposed to be constructed. The agreement is in effect that the city will issue and sell its bonds in payment of two-thirds of the expense of the construction of such tunnel and its approaches, and to provide the same with railroad tracks for the operation of the company's trains through said tunnel. The railroad company to contribute one-third of the expense of such tunnel. The city is to sell, and the railroad to purchase, the city's interest in the tunnel upon payment to the city of the amount invested, with interest, within a specified time, and in the meantime to use the same as a part of its railroad line, and to pay the interest on the city's bonds.

The city has not projected, provided for, nor has it declared its intention to build, construct, own or operate

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a water system, power plant, or any other public utility, of which the tunnel is to form a component part, or in which it is to be of any use to the city whatsoever.

Stripped of non-essentials for consideration here, and of improbable contingencies and remote possibilities, the foregoing statement presents the gist or rather the meat of the agreement between the city and the railroad company:

The railroad company operates its line over the mountains. It is important, and may be necessary for it to reduce its grade by going through the mountain by means of a tunnel. The city agrees with it, to issue its bonds in payment of two-thirds of the expense of driving the tunnel, constructing the railroad tracks, and proper approaches with the other necessary equipment to enable the railroad company to connect with its tracks at both ends of the tunnel. For this the company agrees to pay the interest on the bonds, and finally the principal, and upon such payment is to receive full title to the tunnel as constructed, for its purposes. Plainly this is in violation of the constitutional provisions, in that the city pledges its faith and credit for the benefit and use of the railroad corporation, and as plainly this is in aid of the railroad corporation.

It is likewise just as clear that this constitutes a joint enterprise between the city and the company, to last until the company shall have purchased the city's interests. By every legal test it is a partnership.

Do the other provisions of the agreement relieve it from this limitation of power.

Counsel for the defendants in error assert that there are four reservations in the contract that take it out of the inhibition of the constitution. We will consider these in the order and in the exact language presented:

> "1. The perpetual right to use the tunnel free of rental or charge, as an aqueduct, and to install conduits therein for the purpose of bringing water from the western slope to be used by the city and its inhabitants."

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The agreement specifically provides that all the money contributed by the city shall be expended in the construction and equipment of the tunnel for railroad purposes alone. Not a dollar of this fund is to be used to install conduits or other means for the purpose of bringing water from the western slope to be used by the city and its inhabitants.

The engineers were to report the probable cost of the tunnel ready for the installation of facilities for the transportation of water and electricity for use by the City and County of Denver, and ready for the electrical operation of a single-track railroad, and for the building and completion of said tunnel, approaches, and railroad, and stationary railroad facilities.

The tunnel is thus to be ready only for the installation of city facilities, but is to be fully equipped for the purpose of railroad operation by the company, including the approaches and tracks. In another part of the agreement it is said the tunnel is to be "ready for the laying of pipes" by the city.

In the agreement, the rights of the city are specifically referred to as "easements." The agreement specifically provides, not for construction for the city's use, but the right only to the city of an easement.

> "To construct and operate through said tunnel, an aqueduct, pipe line, or other apparatus for conveying water from the western to the eastern portal for use by the said City and County of Denver, for domestic, power, and other purposes, also the right to extend through the same, cables, wires and other apparatus for conveying electricity, to be used for power, light and other purposes by the city; subject to the conditions that all installation of equipment and use of said tunnel and approaches for the purposes aforesaid, shall not destroy, impair, or unreasonably interrupt the uses of said tunnel for said railroad purposes."

Counsel for the city in their brief say:

> "For drainage and other purposes, it is necessary to have the center of the Moffat Tunnel slightly

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higher than either portal; and, as a matter of fact, the western portal of the tunnel, as now proposed, will be fifty or sixty feet lower than the eastern portal. These facts have given rise to a doubt in the minds of many intelligent people as to the ability of the city to bring water through the tunnel from the western slope. This doubt does, not, however, exist in the minds of educated engineers. It arises through a want of knowledge and experience on the part of the ordinary, though educated and intelligent laymen. In reality, the circumstances detailed present no difficulty whatever. By employment of what may be termed the 'inverted siphon' principle, all difficulty is overcome."

They also submit a drawing showing a vertical section of the mountain, the line of the proposed tunnel, the portals, and the line of level, and argue that the conveyance of water through the tunnel after its construction for railroad purposes, is an engineering possibility.

But this is not intended or suggested as a part of the agreement under which the city is to spend its money, to obtain which it must levy a tax upon its citizens.

Besides this, it is conceded that the city has no rights to the use of water west of the proposed tunnel, or that it has declared a purpose to acquire any such right, or has any intention to so do, or that it has a purpose to convey water through such tunnel, or by any other means, for the use of its inhabitants or otherwise, or that it has a purpose to attempt to convert such an engineering possibility into an accomplished fact. Indeed, under the express provision of the charter amendment the purpose of the tunnel is not necessarily for the conduct of water or electricity, but for any one of four purposes, for it recites, "for the purpose of transporting freight, passengers, water and electricity, or for any one or more of such purposes." And the amendment again recites: "But in enlarging said tunnel or otherwise preparing it for, and, subjecting it to, the said water or electric uses, the original use to which it shall have been subjected, shall not be impaired or needlessly inter-

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rupted." The "original use" can be none other than for railroad transportation purposes, and by the Denver and Salt Lake road.

The second reservation to the city, relied on by counsel to sustain their contentions is as follows:

> "2. The perpetual right, free of rental or charge, to install wires, together with all other apparatus that may be necessary, and bring electricity through the tunnel for lighting and power and other uses by the city and its inhabitants."

What has been said concerning the first proposition applies with equal force to this one, which deals with the possible transmission of electric current. Clearly the record discloses no intent or purpose upon the part of the city, to acquire power for the generation of electricity at a point beyond the tunnel or at any other point, or to engage in the generation and distribution of electricity for any municipal or other purpose.

And if it did so intend, certainly it would not undertake the construction of a tunnel at an expense to the city, of three millions of dollars, in the face of the common knowledge that electric current may be as easily conveyed over the mountains as through a tunnel, and at a comparatively insignificant expense.

The third reservation in the agreement, cited by counsel and upon which reliance is had, is:

> "3. The ownership of mineral veins discovered in constructing the tunnel, and the perpetual right, free of charge, to locate the same and mine the ore therein; provided the city acquires the legal right to such veins; and provided also that such mining shall not interfere with, impede, endanger, or destroy the use of the tunnel for transportation purposes."

Certainly it will not be seriously contended that a municipality as such, can have the lawful right to levy a tax upon its citizens, in the absence of specific constitutional authority, for the purpose of locating mining claims, and engaging in the mining of metalliferous ores.

If it may do so in Grand and Gilpin counties, it may

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with equal right and more propriety, so engage in the well known mining districts of Cripple Creek, Telluride or Leadville. We know of no authority wherein it has even been suggested that such a business comes within the range of municipal purposes. Besides, the discovery of valuable ores in the proposed tunnel can be said to be nothing more than a very remote possibility, and it will hardly be said that prospecting for ores, is a municipal power. But by what right may the city and the railroad company contract as to the ownership of ores located upon premises to which neither of the contracting parties have any right, title or interest.

The fourth and last proposition upon which counsel rely is the following:

> "4. The perpetual right to subject the tunnel and the railway tracks therein to use by any other railroad desiring such use, including outside trackage rights over the line of said Denver & Salt Lake Railroad for such other railroads, covering a distance of seventy-five miles westerly from the western portal of the tunnel and thirty miles easterly from its eastern portal; such use of the tunnel and trackage rights to be upon reasonable terms to the other railroads so using the same; said terms being already specified in the written contract of October 8th, 1913, between the city and the railroad company."

If it is within the constitutional prohibition for the city to make donation, or grant to, or in aid of one railroad; or to lend or pledge its faith or credit, in aid of one railroad, or to become a joint owner with one railroad, clearly it is within such prohibition to so do with two or more railroads.

This proposition is but a repeated offense against the constitution. It involves another and only a possible contingency. It does not appear that any other railroad company desires or ever will desire, to avail itself of any such privilege, if it be a privilege. And if so, then under the agreement, it must be by a future contract with the Denver & Salt Lake Railroad Company

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alone, and upon terms dictated by that corporation. Such agreements are to be the usual trackage agreements between railroads, in addition to other specific charges. It is true that in general the basis of the terms of such contracts are set out in the contract between the city, and the Denver & Salt Lake Company, but the latter company is to avail itself of all financial benefit. For instance it is provided that each railroad so using the tunnel, must pay one-half of the interest upon the actual cost of construction and equipment of the tunnel and its approaches, on the basis of five per cent of the cost both to the city and the Denver & Salt Lake Company, including motive power, and the proportionate cost of maintenance.

Thus, if four of the great railroad companies, whose lines now enter the City of Denver, and some of which now extend both east and west of the city, with connections extending to both seaboards, should conclude that the use of the proposed tunnel would be of benefit to them in making shorter through routes, or for other reasons, and if the city should conclude that this would be of material commercial advantage to it, an object apparently much desired by the citizens of Denver, then under this provision of the contract, the Denver & Salt Lake Railroad Company is empowered to charge each of such roads $112,500 annually, under the fictitious item of interest, in addition to the usual trackage agreements and other fixed charges provided by the agreement now being considered.

Not because there would be any such interest to pay, for the interest provided for would in the case suggested, amount to but one-half of what these four railroads alone must pay. Upon the estimated cost of construction at $4,500,000, and of five per cent as the rate of interest, these four roads would pay as an annual arbitrary and indefeasible sum, not to the city, but to the Denver & Salt Lake Railroad Company, of $450,000. This right is thus given to that railroad company in perpetuity.

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Thus, during the life of the proposed bonds alone, fifty years, each road so to use the tunnel, must first agree to pay to the Denver & Salt Lake Railroad Company, the sum of $5,625,000 for the use and benefit of that company. And this same right is given to the railroad company, to so tax every additional railroad that may desire to use the tunnel.

Certainly such manifest inequality and injustice, both to the city and to other companies, cannot act as an inducement for such companies to make use of the tunnel. Indeed, it would seem to present such a serious obstacle to the accomplishment of such purpose, as may be absolutely prohibitive. In this feature alone the contract between the city and the Salt Lake Company, if not a grant of subsidy, is infinitely worse, for it confers the power upon the Salt Lake Company to levy tribute upon every other railroad company that may desire to make use of the tunnel. This is a flagrant violation of the constitutional provision.

From our consideration of these provisions inserted in the contract, we are irresistibly forced to the conclusion that they were inserted, not for the accomplishment of a legitimate municipal purpose, but rather in an effort to evade the constitutional prohibition.

Counsel urge that the question here is one for legislative determination, and point out that by elections, both by the voters and tax payers separately expressed, the legislative will of the municipality has been manifested in terms not to be mistaken. This manifestation of the will of the people of the municipality has been constantly before us in the consideration of the case.

But the question we are now considering is not one of the will of the municipality, but is solely a question of limitation of power. We have not overlooked the rule of construction adopted by this court in an opinion written by the late Chief Justice Steele, in the case of *Denver v. Hallett,* 34 Colo. 398, 83 Pac. 1068, but rather to reiterate and emphasize it. It was there said:

"In a number of cases before this court as well

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as the court of appeals, it has been held that with respect to municipal corporations, except as limited by the constitution, the general assembly has plenary power; that it is clearly a legislative function to determine what power shall be granted, what withheld, and what restrictions shall be imposed in the exercise of the powers granted. * * * The supremacy of the legislative authority over municipal corporations is not, however, in all respects unlimited, but the limitation must be sought in the national or state constitution."

It will certainly not be contended that either by the legislature of the state, or by the legislative powers of a municipality, such powers as are expressly prohibited by the organic law, may be exercised by either. Ours is a constitutional government, wherein the sovereign will of all the people, as expressed in the constitution, is supreme, beyond the express limitations of which a municipality may not go. If the municipality may offend, then so may the individual. If this may be done in case of the levy of a prohibited tax, it follows that it may be done in a case involving life or liberty; the Bill of Rights is then no protection, and the constitution becomes a rope of sand.

It is said that under the provisions of sec. 1, art. 20, there is the implied power to do that which is attempted in this case. The provision relied on is:

"The municipal corporation known as the City of Denver, etc., shall have the power, within or without its territorial limits, to construct, condemn, and purchase, acquire, lease, add to, maintain, conduct and operate, waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may

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be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided."

Nowhere in sec. 1, art. 20 can there be found express alteration or limit of the prohibition contained in secs. 1 and 2 of art. XI, and all municipalities operating under the 20th art. are clearly subject to such limitations.

It is said in 1 Dill. Mun. Corp. 399, and heretofore approved by this court:

"It is a general and understood proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; Second, those necessarily or fairly implied in, or incident to, the powers expressly granted; Third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created, is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void."

From what has been said, it is clear that the declaration in the amendment to the charter, sec. 355, to the effect that the tunnel will be of local use, and convenience to the public, and is essential to the future growth and welfare of the city and county, cannot prevail as against an express constitutional prohibition of the power therein attempted to be exercised.

Higgins v. San Diego Water Co., 118 Cal. 537, 50 Pac. 674, was a case where there was an attempt to violate constitutional limitations similar to ours.

In that case a flume company was the owner of a

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water supply and system of pipes by which it brought water to the city limits. A water company had pipes and all necessary facilities for distributing water to consumers throughout the city. These two companies entered into an agreement constituting the water company sole agent for the flume company for the sale of its water to the city. The entire distributing plant was then turned over to the city. This was in form of a lease to five citizens of the city, who in turn granted a sub-lease to the city. One of the considerations of the lease was that the water company should cause a railroad to be constructed from the City of San Diego to a point in Mexico. The court held:

> "That these reasons, and for these alone, the contract was held invalid by the learned judge of the Superior Court. As to the other objection above stated he says in the opinion referred to: 'While it is very evident from the terms of the contract that the hope that a railroad would be constructed was one of the moving causes for the city authorities entering into the contract, it was not in my opinion a consideration of the contract, but merely a condition subsequent which falls because invalid, without affecting the other provisions of the contract.' And in his conclusions of law he holds: 'That said lease and sublease were not void because the amount agreed to be paid was a subsidy to or in aid of the construction of a railroad.' These conclusions are based upon findings to the effect that the city waived the construction of the railroad, and that neither the city nor its mayor acting in its behalf, was induced to enter into the contract by any promises or representations of the officers or agents of the water company that the railroad would be built."
>
> And again the Supreme Court said: "The result of the foregoing discussion is that the contract of the city with water company is held invalid upon at least two grounds: 1. Because the city was led by the contrivance of the water company to agree to pay, under the name of rent, a subsidy to a railroad; and, 2. Because the mayor had not sufficient authority to execute it on the part of the city."

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Counsel for the city cites many cases upon which they rely, and which it seems proper to carefully consider.

Among these is *Denver v. Hallett,* 34 Colo. 393. But that case involved simply whether or not the issuance of bonds by the city for the construction of an auditorium within the city and for public use, was a municipal purpose within the meaning of the laws of the state. The question did not involve that of aid to a private corporation, or any joint ownership or partnership with such person or corporation. It was an entirely different and distinct proposition and can in no way aid in the determination of the case at bar.

I apprehend that if the proposition there, involved an agreement between the city and a private party, wherein the city was to pay two-thirds of the cost, and a private person or corporation was to pay one-third of the cost, with each party reserving the right to separate and different uses of the building, or to different parts thereof, and coupled with the provision that the city should thereafter sell its interest therein to the private party for its own uses, the bond issue could not and would not have been sustained.

From a careful examination of the authorities cited in the able and exhaustive briefs of counsel on both sides of this controversy, and from such examination as we have been able to make in the limited time at our disposal, we do not find one that even hints that it is within the ordinary powers of a municipal corporation to construct an improvement, convenience or necessity with the avowed and declared purpose of selling the same or an interest therein, to a private person or corporation. This seems to be repugnant to every conception of the term, "municipal purpose."

In this case however, counsel contend that the agreement to sell was a mere option. But the city has expressly agreed to sell and convey title to the railroad company for a stipulated price, and the railroad company has agreed to buy and pay the agreed price. This

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constitutes an executed contract, not an option. But if it were said to be an option, it is still a contract to sell, and for such reason the purpose of the city is the same,

Counsel for the city cite also as tending to sustain the validity of the proposed bond issue, the following cases: *Walker v. City of Cincinnati,* 21 Ohio St. 14, 8 Am. Rep. 24; *Sun Printing & Pub Co. v. Mayor,* 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; *Admiral Realty Co. v. N. Y. City,* 206 N. Y. 110, 99 N. E. 245, Ann. Cas. 1914A, 1054; *Haeussler v. City of St. Louis,* 205 Mo. 656, 103 S. W. 1034.

Walker v. City of Cincinnati, supra, involved the validity of an act of the legislature authorizing cities of one hundred and fifty thousand or more inhabitants, under conditions specified in the act, to provide for the construction of a line of railway over terminals, of which one should be within the city.

The specific case was, that the City of Cincinnati voted bonds for the construction of, and did construct a railroad extending from the City of Cincinnati, to the City of Chattanooga, in the State of Tennessee.

The provision of the Ohio constitution said to be violated was; "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or raise money for, or loan its credit to, or in aid of any such company, corporation or association."

It will be seen that the provision of the Colorado constitution is broader and more exclusive than the one stated, in that it denies this power to the state as well as to corporate subdivisions, and uses the terms, "directly," or "indirectly," "in any manner," "public or private," "for any amount," or for "any purpose whatsoever," or "become responsible for any debt," "contract or liability," "in or out of the state," "make any donation to," "grant, or in aid of," "subscribe to," "shareholder in," "joint owner with," etc.

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But in that case the purpose of that section of the constitution was distinctly stated to be; "the mischief which this section interdicts is a business partnership between a municipality or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit, in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named, permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein. Though joint stock companies, corporations and associations only are barred, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person, or from that of several persons associated together."

Such action of the city was there sustained upon the sole ground that it was the exclusive enterprise of the city. This is the view expressed by the same court in later cases, and it was expressly stated in *Cincinnati v. Dexter*, 55 Ohio St. 93, that "In *Cincinnati v. Walker*, the constitutionality of the act is there placed upon the ground that the construction of an improvement of that kind, to be owned exclusively by the municipality, does not involve an alliance of public and private capital or credit, nor constitute a loan of municipal credit to, or raising money for, or in aid of other parties, incorporated, or unincorporated, and, therefore, it is as competent, by legislation to authorize municipal corporations to construct improvements of that nature, and provide means therefor by taxation, when deemed essential to the public interests, as to authorize them to acquire and hold property for other needed public uses, and make other municipal improvements."

In the case of *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, 34 L. Ed. 864, 11 Sup. Ct. 215, the

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court speaking through Mr. Justice Brewer, so recognized the distinction made by the Ohio court in the Cincinnati case. This was a case arising under the provision of the Ohio constitution and under which, aid to a railroad corporation was held to be repugnant.

Discussing the spirit of such a constitutional provision as we are now considering, it was said:

> "The significance of its inhibition is read in the evil which it was intended to remedy. Common was the practice, theretofore, of issuing municipal bonds to aid in the construction of railroads. The practice was felt to be evil, stimulating unnecessary railroad enterprises, and injuriously affecting the interests of the taxpayer. The universal method of railroad enterprises was through private corporations. The possibility of other methods was unknown, or not seriously contemplated. So, when the people by their constitution prohibited public aid to private corporations, obviously the thought was that all public assistance to the building of railroads was prohibited. The ingenuity of the lawyer and the legislator, by means of which the letter of this prohibition was avoided, and a city enabled to construct a railroad running from itself to other parts of the county, as a great highway of approach and distribution of its business, was obviously not expected or foreseen. We are not criticising the decision in *Walker v. Cincinnati,* 21 Ohio St. *supra,* as an erroneous construction of the constitutional provision. We simply note the fact that the statute therein construed was a skillful avoidance of its generally understood scope."

Since the Cincinnati case was decided, the supreme court of Ohio has considered the same question in other cases and in each of these, has denied the validity of a statute authorizing a grant of aid to a railroad corporation.—*Taylor v. Commissioners of Ross Co.,* 23 Ohio St. 22; *Jacob Wyscaver et al. v. W. H. Atkinson et al.,* 37 Ohio St. 80; *Counterman v. Doublin Township,* 38 Ohio St. 515.

Taylor v. Commissioners, supra, is a very exhaust-

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ive discussion of the question and it was there said, among other things:

> "But the tenth section is a constituent part of the plan or method provided by the act for accomplishing its objects. That section provides, that the 'County Commissioners shall have power, and they are hereby authorized, to lease said road, constructed under the provisions of this act, before or after completion, * * * or to sell the same for such compensation and upon such terms as may be agreed upon by said commissioners and lessee or purchaser. * * * Thus, by section ten, it appears the commissioners, or other public authorities operating under the act, are invested with authority to sell or lease the road either before or after completion. It would be within their power to sell what is called the road at any time; certainly after the making of the contract. Now, in such case, what is sold? Substantially the right to use the public bonds to construct a work which becomes the property of the purchaser as fast as it is built."
>
> And again: "The extent of such aid can make no difference. The mandate of the constitution is, that such aid shall never be authorized. Whatever is furnished must be exacted by taxation; and whether the amount be large or small, to recognize the authority under which it is sought to be imposed, would be to deny the protection guaranteed by the constitution to every tax-payer."

In *Wyscaver v. Atkinson, supra,* after quoting and approving the doctrine of other Ohio cases it was said:

> "And I will add, that it make no difference whether the scheme for the union of public and private money or credit, originates with the party or parties representing the public or the private interests. In short, the thing prohibited is the combination in any form whatever of the public funds or credit of any county, city, town or township with the capital of any other person, whether corporated or unincorporated, for the purpose of promoting any enterprise whatever. From these views it is plain that the statute before us manifests an intent to do

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that indirectly which, if done directly, would constitute a palpable infraction of the constitution, for which reason it must be declared inoperative and void."

Sun Printing Co. v. Mayor, supra, involved the validity of a statute authorizing cities of over a million inhabitants to construct railroads therein which shall be deemed public highways, at their own expense, etc.

This was a case where the city of New York constructed at its own expense a system of subways for transportation purposes. The city was to own these in perpetuity and to lease the use thereof to a private corporation for a limited term. The subways were to be constructed entirely within the city and for the use of the public therein. The court held that this was not in violation of a constitutional limitation similar to our own, for the reason that the improvement was to be constructed entirely by the city, to be owned by the city and in perpetuity, and that it was not in aid of a private corporation, nor was there any joint ownership, nor mingling of public funds with that of private persons or corporations. But it was held in that case that such a lease by the city in perpetuity, would be in violation of the constitution, and construed the leases proposed, to be for a limited term only.

That case clearly distinguishes the right of a city to construct and perpetually own as its sole property, such a public improvement, from a joint ownership, or, aid of, or the loan of the city's faith or credit to a private corporation.

Speaking of the constitutional inhibition, the court said:

"This provision should be construed with reference to the evils it was intended to correct. It first found place in the Constitution in 1874. Prior to this, there had been upon the statute books that which was commonly known as the Town Bonding Act. Under it numerous railroads had been built upon the bonds procured from towns through which they were constructed in return for stock issued by the

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corporations. The inhabitants of the towns were induced to give their consent through supposed benefits that would result to their property and upon representations that the earnings of the road would provide dividends upon the stock, with which they could pay their bonds. In some instances the bonds were procured and sold and the roads never built. In many other cases the roads in a few years were sold out under foreclosure of mortgages and the stock cut off. So great was the evil and so heavy was the burden upon the towns that relief was sought through a constitutional provision. It was this evil that the provision in question was intended to correct, and with this situation in view it should be construed. There had been, at that time, no attempt on the part of municipalities to construct and own railroads. Such a project had not been publicly promulgated, discussed or contemplated. The towns had subscribed for the stock in private corporations and in most instances they had lost. Hence, the provision that they should not give any money or loan their credit to or in aid of any individual, association, or corporation, or become owners of stock or bonds of any such individual, association or corporation. This was not intended, nor does it prohibit municipalities from constructing their own roads and paying therefor when necessary and authorized by the legislature."

It was further said in that case, that "we do not understand that the views above expressed are in conflict with the Ohio cases. In that state the constitution does not limit municipal expenditures to 'a city purpose.' We do not, however, wish to be understood as approving of those cases, especially in so far as they sustain the right of a city to construct a railroad mainly outside of its own territory and state."

In the case at bar, there is not only the objection that there is a grant of lease in perpetuity, but of an absolute sale of the tunnel itself, reserving only an easement for the possible purpose of conducting water and electricity through it, and which shall in no way inter-

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fere with the railroad's exclusive and perpetual use for railway transportation purposes.

The case of *Admiralty Realty Co. v. City of New York, supra,* involved the question of the lease of the subways then constructed and owned by the city, and of the construction of additional subways, by the city and to be owned by it, and the lease by the city of all these.

This was no different in principle from the case of *Sun Printing Co. v. Mayor, supra,* and it was expressly said:

> "It is to be noted that there is no provision that the city shall loan its credit by guaranteeing payment of the bonds by which it is assumed the Interborough Company will raise the money which it is to expend."

The case of *Haeussler v. City of St. Louis, supra,* was one which involved an issue of city bonds for the following purpose:

> "For the construction and maintenance of a municipal bridge for public use by railroads, street cars, vehicles of all kinds and pedestrians, over and across the Mississippi river and located within the corporate limits of said city of St. Louis, and the state of Illinois, and for the purchase of all lands to be used for approaches in connection therewith, and which said bridge shall at all times, be and forever remain a free bridge; *provided,* however, the city reserves the right to grant franchises for the use of such bridge for public service purposes, upon such terms and compensation as may be prescribed by ordinance; and, provided further, that no such franchise shall confer an exclusive right in respect to such public service purposes upon the grantee thereof."

This was authorized by a state statute, and by an act of congress permitting one end of the bridge and the approach thereto in the state of Illinois.

But here likewise, the city exclusively was to construct and forever own the bridge, and which was to remain a free bridge forever, with the right of the city to

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grant franchises but not exclusive, for the use of such bridge for public service purposes.

It was held in that case that this was not in violation of a constitutional provision similar to the one we are discussing and the reason therefor was expressly stated as follows:

> "These ordinances in no wise violate the constitutional provisions quoted. Under these ordinances not a dollar is given to any individual or corporation, nor by them has the city become a subscriber to the capital stock of any railroad or other corporation. On the other hand, the city is to be the absolute and sole owner of the proposed public improvement, and is to have the absolute and sole control and management thereof. Similar constitutional provisions in like cases have been discussed by the courts, and in practically every case the holdings are against the contentions of the plaintiffs.—*Sun Printing & Pub. Co. v. Mayor, etc., of N. Y.*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788; *Brooke v. Philadelphia*, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781; *South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. *loc. cit.* 454, 31 C. C. A. 585; *Prince v. Crocker* (Boston Subway Case) 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Walker v. City of Cincinnati et al.*, 21 Ohio St. loc. cit. 55, 56, 8 Am. Rep. 24; *Pleasant Township v. Ins. Co.*, 138 U. S. loc. cit. 74, 11 Sup. Ct. 215, 34 L. Ed. 864.
>
> It may be true that, under the terms of the ordinances and the law, the city can grant to railway and street car corporations the right to use the public highway, so constructed, owned and controlled by it; but that does not change the ownership nor the control. Such is true of every highway controlled by the city. Such privileges can be granted, provided the public way is not seriously impaired for public use."

It should be noted that in no case brought to our attention involving a similar constitutional provision, has the right of a state, city, county, township or other corporate entity of the state, been sustained to aid a pri-

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vate corporation, by means of subscription to stock, the issue of bonds, by joint interest or ownership, or through direction or indirection, or by any means or device whatsoever. Indeed, this question has been so well settled by the Supreme Court of the United States, and appellate courts of the states, that we find no recorded case since that of *Pleasant Township v. Ins. Co., supra,* decided in 1891, in which there has been an attempt to violate, or evade such a constitutional limitation, until the present case.

All cases cited as tending to sustain the contention of the city here, are those wherein the municipality is the sole contributor to the enterprise and the sole owner thereof, and in perpetuity. In none of such cases was there commingling of public and private funds, in any form or manner whatsoever. That a city may, with the good faith purpose of constructing or enlarging a municipal water plant, construct a tunnel or other improvement, reasonably necessary to convey its supply of water or an essential part thereof, to the city and at any point beyond the limits of the city, cannot be questioned.

This power is clearly conferred by section one of the 20th article, and has been universally held to exist, as implied within the express power to construct, own and maintain such municipal water plant. But this must be by the municipality alone, and as being a public purpose for which taxes may be levied.

The question presented here is entirely different from that where a city undertake to construct such a tunnel, with such necessary and good faith purpose, with its own funds, and to be so exclusively owned by the city. But the proposed bond issue here, is clearly both in letter and spirit, within the inhibition of secs. 1 and 2 of art. XI, of the constitution, and is void. So holding, it becomes unnecessary to consider the question concerning the length of time for which such bonds may run.

The judgment is reversed with instruction to overrule the demurrer and proceed in accordance with the views expressed in this opinion.

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En banc.

MR. JUSTICE GABBERT dissenting:

At an election held May 20, 1913, section 355 of the charter was adopted by the electors of the city. By this section a tunnel commission was created, and provisions made for the issuance of bonds to raise funds with which to construct the "Moffat Tunnel", and on February 17, last, the taxpayers of the city, voted in favor of issuing such bonds. It is the validity of these bonds which is the subject of inquiry, and the only question involved in this proceeding, and the question thus presented must be determined by ascertaining whether the city, by our fundamental law, the constitution of the state, is without power, or is inhibited to create an indebtedness by the issuance of the bonds in question, for the purposes and under the conditions specified in section 355 *supra,* and the contract hereafter noticed, in order to raise funds with which to construct the tunnel. The amendment to the charter, section 355, and the authorization of the voters to issue the bonds are legislative acts adopted by the people of Denver under their charter. It is elementary, as often declared by this court, that a legislative act will not be declared unconstitutional, unless it is clearly and palpably so, and in cases of doubt every intendment will be made in favor of its constitutionality, and that courts will only interfere in cases of clear and unquestioned violations of the fundamental law. In other words, a legislative act must be held constitutional, unless its unconstitutionality is established beyond a reasonable doubt.

The majority opinion declares the city is without authority to authorize the issuance of the bonds involved, because inhibited by sections 1 and 2 article XI of the constitution. With due deference to the majority, it is submitted, that this is not tenable. In substance, so far as material to consider, sections 1 and 2 article XI pro-

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vide that a city shall not lend or pledge its credit, directly or indirectly in any manner to, or in aid of any corporation for any amount, for any purpose, or become responsible for any debt, or liability of any corporation, nor shall it make any donation to, or in aid of any corporation, or become a joint owner with such corporation. That neither of these provisions is violated, is clear when section 355 of the charter, and the contract entered into between the tunnel commission, and the Denver and Salt Lake Railroad Company are analyzed. Section 355 creates a tunnel commission, and confers upon that body all the powers granted to the city by article XX of the constitution, and otherwise existing by operation of law; authorizes the commission to acquire, construct, build, or assist in building, a tunnel through the main range of the Rocky Mountains, in the vicinity of James Peak, and the necessary approaches thereto, to be known as the "Moffat Tunnel", for the purposes of transporting freight, passengers, water, and electricity; provided that in the event the tunnel shall be originally constructed for the transportation of freight and passengers, the right shall be reserved by the city in perpetuity to construct and operate through such tunnel suitable apparatus for conveying water and electric current from the western to the eastern portal for the use of the inhabitants of the city, and to permit the use of the tunnel, upon a fair and equitable basis, by any and all railway lines desiring such use. It also provides the commission may arrange that a portion of the funds needed for the construction of the tunnel may be furnished by corporations, and that the commission may enter into contracts with such corporations with reference to the construction, control, future lease, sale, or disposition of the tunnel, but expressly provides that until the city shall have been reimbursed in full for all moneys expended by it with interest, and is discharged from all financial liability in connection therewith, it shall retain the ownership of the tunnel, and that the rights reserved to utilize it for the trans-

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portation of water and electricity, shall be perpetually retained, notwithstanding, any sale or lease of the tunnel. The section then provides that if on investigation the commission shall find that the construction of the tunnel is desirable and feasible, that that body shall determine the amount of bonds necessary to be issued for that purpose, and may by ordinance of the city council, submit to the vote of the taxpaying electors, the proposition of issuing such bonds, and if it is carried, that annually thereafter, a tax shall be levied to raise funds to discharge the interest and the principal of the bonds as they mature, unless suitable provisions for these purposes are otherwise made, and finally declares, "The inhabitants of the City and County of Denver, by the adoption of this Charter Amendment, do find and declare that the said tunnel will, in their judgment be of local use and convenience to the people, and that it is also absolutely essential to the future growth and welfare of the said City and County".

After the adoption of this section the commission entered into a contract with the Denver and Salt Lake Railroad Company, which owns and is operating a line of railroad from Denver west, the salient features of which are as follows: The tunnel shall be constructed by the commission and two thirds of the cost, or three million dollars is to be paid by the city, and one-third by the railroad up to four and one-half million dollars, and the excess above that amount, if any, is to be paid by the company; that the amount to be paid by the company shall be deposited with a depository, to be mutually agreed upon, or secured in a suitable manner; that the company shall pay the interest on the bonds and provide a sinking fund to discharge them at maturity, and that the consideration for the obligations which it thus assumes, is the right to operate and maintain the tunnel for railroad purposes, and ultimately acquire it for this purpose. It requires the railroad company, upon the request of the city, to allow any other railroad company to use the tunnel, and its tracks and facilities for a

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distance of thirty miles east and a distance seventy-five miles west of the tunnel, upon specified conditions. The contract requires the company to commence work upon the extension of its road from Craig to Salt Lake contemporaneously with the commencement of work upon the tunnel, and complete it within five years after the completion of the tunnel. By the contract the company is given the option on or before the maturity of the bonds, to purchase the tunnel by the payment of the principal of such bonds, and accrued interest thereon, but this option is subject to the perpetual right of the city to transport through the tunnel, water and electric current, and also subject to the perpetual right reserved by the city to have the tunnel, approaches and tracks outside used by other railroads. In other words, the option extends only to the purchase of the tunnel by the company for its own railroad operation purposes, and does not give the company the right, in the event of such purchase, to interfere with the use of the tunnel by the city for any of the other purposes for which it is to be built by the city. The company is to operate the tunnel for railroad purposes at its own expense. Finally, the contract provides that if the company, after completion or during the construction of the tunnel fails to pay the interest on the bonds or deposit the necessary amount in the sinking fund, or comply with any other material provision of the contract for three months, it may be terminated by the commission, and all moneys paid by the company thereunder forfeited and held as liquidated damages. It contains other provisions which are not of any moment in determining the validity of the bonds.

From the foregoing synopsis of the provisions of section 355 and the contract, it is apparent that there is not a word or line in either which violates, in letter or spirit, the inhibitions contained in sections 1 and 2 article XI of the constitution. The city has not loaned or pledged its credit to, or in aid of the railroad company in any amount, or in any manner, for any purpose whatever; it

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has not become responsible for any debt, contract, or liability of the company, neither has it made any donation or grant to, or in aid of the company. In brief, the construction of the tunnel is undertaken by the city alone for its own benefit, and the tunnel is, and remains its own exclusive property until the option to purchase is exercised. True, the company is to furnish at least one third of the cost of the tunnel, but the city is not obligated to refund the sum thus advanced, and incurs no liability of any kind in connection with such advancement. On the contrary, if the company fails to comply with the obligations imposed upon it by the contract, it forfeits the advancement to the city. The consideration for the advancement by the company is an option to purchase the tunnel, and a lease or license to lay tracks in the tunnel, and operate its trains through the same. It would certainly be an anomalous proposition to say that because the city had undertaken to construct the tunnel it was without authority, for a valuable consideration, to contract in advance to sell or lease it for one of the purposes for which it was constructed. No such inhibition is found in the provisions of the constitution under consideration, and it is impossible, in my opinion, to deduce from either section 355 of the charter, or the contract, that by this arrangement the city has pledged its credit to, or in aid of the company; become responsible for its debts, or made a donation to it. The option to purchase and lease or license given the company is nothing more than the exercise of wise business judgment on the part of the commission, which assures the use of the tunnel for one of the main purposes for which it was designed, and in effect provides for a return upon the investment by the city, until the option to purchase is exercised, and then if exercised, leave such rights in the city as will enable it to require the purchaser to permit the use of the tunnel by other railroad companies, and the other purposes for which it is designed. Nor in the event the company purchases the tunnel, nor under the arrangement existing, until the option to purchase is exercised, is

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there any joint ownership which the constitution inhibits. The tunnel is the property of the city. It has no interest whatever in the railroad or its operation; this belongs exclusively to the railroad company, and in case it purchases the tunnel its ownership is for a purpose with which the city is in no manner connected. The city will still have the right to use the tunnel for the transportation of water and electricity, but this right belongs to it alone. The joint ownership which the constitution inhibits, is a joint ownership for the same purpose or use. Neither can it be said that because the section provides that the commission may assist in building the tunnel, it thereby lends aid to a coropration which the constitution inhibits, as that would depend upon whether under any contract the commission entered into, by virtue of provision of the section, aid was given contrary to constitutional restrictions. It is therefore manifest that plaintiff in error has not only failed to establish beyond a reasonable doubt, that section 355 of the charter or the contract violate the constitutional provisions under consideration, but it appears clearly and beyond question that they do not.

Suppose the tunnel commission had been given power in the first instance to construct the tunnel at the expense of the city, by the issuance of bonds, and after it had been constructed, had been authorized in a legal manner to enter into a contract with a railroad company, operating a line of road from the city west, to lease the tunnel to the company for railroad purposes, and give it an option to purchase the tunnel, it certainly could not be said that such authority was inhibited by the constitution. Between such an arrangement and the one made there is no difference in effect or principle, except that the commission by entering into the arrangement it has in advance, as authorized to do by section 355, has exercised sound business sense, for the reason provision has been made before any money is expended which assures the use of the tunnel for the transportation of freight and passengers, the payment of a valuable consideration upon the

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money expended, and for a sale which will reimburse the city for all expenditures. Such an arrangement is to be commended, rather than condemned upon the theory that thereby constitutional limitations are violated, when in effect it is simply the exercise of good business judgment.

Counsel for plaintiff in error contend that the city is without power to issue the bonds because a municipal corporation cannot exercise any powers except those expressly granted, or fairly implied as incident to such powers, or those essential to the declared objects and purposes of the corporation. This is a sound proposition of law, but in no sense applicable. Denver is operating under a special charter by virtue of the provisions of article 20 of the constitution. *In Walker v. The City of Cincinnati,* 21 Ohio St. 14, 14 Am. Rep. 24, an act of the legislature of Ohio which empowered the city to build a railroad from the city to Chattanooga, was under consideration. The supreme court of Ohio held, that unless prohibited by the constitution it was within the legitimate scope of legislative power to authorize a city to construct a railroad in which it had a special interest. In this connection it should be noted, that Judge Dillon in his work on municipal corporations, from which counsel for plaintiff in error have quoted extensively, says in effect, that in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal corporation to construct railways in which such corporation has a special interest, and impose upon its citizens taxes for that purpose. If Denver could construct a railroad to Salt Lake, including the tunnel, clearly it may construct one of the important links in the line, namely, the tunnel alone, on its own account, and in consideration of a railroad company aiding in constructing it, give such company a lease and option to purchase. Otherwise the tunnel would not benefit the city. Our own court has repeatedly held that the object of article XX was to confer upon the people of Denver, not only the powers expressly mentioned in that article, but every

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power the legislature theretofore possessed in making a charter for Denver.

It was upon the basis that the people of the city of Denver possessed power to legislate with respect to charter provisions that we held in the Auditorium case, (*Denver v. Hallett,* 34 Colo. 393.) it was within the power of the people of the city of Denver to provide by charter for the erection of an auditorium, and to issue bonds to discharge the indebtedness for that purpose, for the reason that the people of the city possessed the power to legislate on this subject. That is precisely the situation in the case at bar. Authority has been conferred upon the tunnel commission to build the Moffat tunnel, through legislation by the people of the city, which they have the power to enact. They have provided for the issuance of bonds for this purpose; they have declared that the tunnel will be of local use and convenience to the people, and that it is absolutely essential to the future growth and welfare of the city. It is manifest from the topography of the country west of the city, the necessities of the city, and the beneficial results which will follow the construction of the tunnel that these declarations have ample foundation upon which to base them. If the city could build an auditorium, which it was evident was not necessary for any municipal purpose, in the ordinary meaning of that term, and could not result in any financial benefit to the people of the city, except as it would serve to attract national conventions of various organizations which might meet here at long intervals of time, it certainly cannot be successfully asserted that the electors of Denver may not make provision by appropriate legislation, to construct a tunnel for the transportation of freight and passengers which will be of benefit to the people every day in the year.

Counsel for defendants in error contend that special authority is conferred upon the city to construct the tunnel under article XX of the constitution. It is unnecessary to discuss this question as it is clear the city is not inhibited from constructing such tunnel by that section.

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Counsel for plaintiff in error suggest that some portions of section 355 are invalid because they undertake to empower the city to engage in business which it cannot be permitted to engage in. In answer to this it is only necessary to say, that where a part of an act is unconstitutional it does not vitiate the part that is good, when the good and bad can be clearly separated, and the good is complete in itself, and does not depend upon the void portion. They also urge that the section violates section 8, of article XI of the constitution. In the opinion of the writer this contention is not tenable.

In my opinion the judgment of the district court sustaining the validity of the bonds should be affirmed.

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[No. 7654.]

RICHARDSON ET AL. V. KEELY.

1. PARTNERSHIP—*Wherein It Consists—Evidence.* A partnership may be formed without intending it. Where the parties agree upon an arrangement which is, in law, a partnership, it is of no importance that they do not intend to form a partnership, or that they call it something else. Names go for nothing where inapplicable to the substance of the arrangement. (53, 54)

McDougall and McClelland bargained for the purchase of a smelter site with a dump thereon containing values, $2,000 to be paid in cash, and the residue in annual installments of $1,000 each. Being without means they arranged with Keely and Ross-Lewin, officers of the bank, that the bank should lend them the $2,000 required for the first payment, Keely and Ross-Lewin guaranteeing the loan, and receiving in consideration of the guarantee one half the profits of the operation of the dump. Accordingly the $2,000 advanced by the bank was applied to discharge the first payment for the dump, McDougall and McClelland executing their notes for the deferred installments, the premises were conveyed to McDougall, and by him to Keely and the dump was operated for several years by McDougall and McClelland under the name of the Union Dump Co. Keely acted as treasurer of this company. All proceeds of the dump were deposited in the bank of which Keely was an officer, and all payments were made therefrom by checks, signed by McDougall and McClelland, and by Keely as treasurer. From the profits of the enterprise the note to the bank was discharged, also two installments of the purchase money, and upon checks signed by Keely, each of the associates received over $1,500. Upon the books of the Dump Co., the property was carried as an asset, and the deferred installments of the purchase money as Bills Payable. *Held* that the transaction created a partnership and that Keely was liable for the unpaid installment of the purchase money. (48, 54)

2. ——*Individual Obligation of Partner, for a Partnership Liability*, accepted without notice of the partnership, binds the firm. (58)

3. EVIDENCE—*Relevancy.* Action against McDougall and Keely as partners to recover an installment of the purchase money of a smelter site and the dump thereon, the legal title to which was vested in Keely. Keely denied the partnership. The complaint and proceedings had in an action instituted by Keely to restrain interference with the operation of the dump received to affect the testimony of Keely that he was not interested in the property, and held competent for this purpose. (52, 53)

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4. ——*Words and Phrases*—"Take a Flyer" means, if anything at all, to share in the proposition presented. (56)

Error to Denver District Court.—Hon. HARRY C. RIDDLE, Judge.

Messrs. MCBETH & MAY, for plaintiffs in error.

Messrs. HUGHES & DORSEY, Mr. BARNWELL S. STUART, and Mr. JOHN Q. DIER, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This action was instituted by the Boston and Colorado Smelting Company, against Hugh McDougall, Hugh R. McClelland and Thomas Keely.

The plaintiff corporation was dissolved prior to the trial and the statutory trustees substituted.

The complaint alleges that prior to the year 1898, the plaintiff was the owner of a smelter site, upon which it had formerly operated a smelter, and upon which there was a large amount of slag containing metal values; that the plaintiff proposed to McDougall and McClelland to sell them the site with the slag for the price of $5,000, of which $2,000 was to be paid in cash, and the remainder in three yearly installments of $1,000 each.

It is then alleged that thereafter and about the 20th day of June, 1898, McDougall and McClelland entered into a partnership agreement with the defendant Thomas Keely and one George E. Ross-Lewin, since deceased, under the terms of which Ross-Lewin and Keely were to advance or cause to be advanced the $2,000 required for the cash payment required, and the property was to be worked for the common interest of all the partners equally; that after the payment of the $2,000 so to be

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advanced, and all cost of operation together with the proposed deferred payments, the profits if any, were to be equally divided between the four partners, and that, on the same day, the premises were conveyed by the defendant McDougall to the defendant Keely, to be by him held in the interest of the partnership. That the parties proceeded to work the slag dump, and out of the profits paid the $2,000 so advanced, and two of the deferred payments, and also paid to each of the four partners $1,591.93 as profits; but that the third deferred payment of $1,000 was not paid; and prayed judgment for this sum against McDougall, McClelland and Keely.

McClelland died pending the suit and was dismissed as a party. Judgment was rendered against McDougall by default. Keely denied the partnership, and this is the sole question presented for consideration. The trial court found for Keely.

There is but little dispute as to the facts. It appears that at the time, McDougall and McClelland had obtained from the smelting company a proposition for the sale of the property upon the terms stated, Ross-Lewin was the vice-president, and Keely was the cashier, of the First National Bank of Denver. McDougall and McClelland went to Ross-Lewin to secure a loan from the bank of the two thousand dollars with which to make the cash payment. After talking the matter over Ross-Lewin called Keely in. Both officers of the bank agreed that it would not be advisable for the bank to make the loan. McDougall and McClelland then represented to Keely and Ross-Lewin that they expected to make a large amount of money out of the deal, and proposed to give them one-half of the profits, if the latter would arrange for the advance of the necessary two thousand dollars. Ross-Lewin suggested to Keely that they "take a flyer," which was apparently done in manner as fol-

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lows: McDougall and McClelland executed their promissory note to the bank for $2,000. Ross-Lewin and Keely as individuals joined in a letter to the bank guaranteeing the payment of the note, and as officers and acting for the bank, accepted the note and letter, and made the loan. The two thousand dollars so obtained was paid to the smelter company which executed its deed for the premises to McDougall, who in turn executed a trust deed in favor of the smelter company, to secure the remainder of the purchase price, evidenced by three notes of McDougall and McClelland, of one thousand dollars each due in one, two and three years respectively. After this, McDougall executed and delivered to Keely a deed to the premises, presumably subject to the trust deed. All this appears to have occurred on the same day.

McDougall and McClelland at once took personal charge of the operation of the property. Under an agreement of the parties an account was opened with the First National Bank, of which Ross-Lewin and Keely were officers, under the name of the Union Dump Company, into which account all receipts from the operation of the property was deposited, and from which all payments were made. Keely acted as treasurer of the Union Dump Company, and as such signed all checks drawn upon this account. From the testimony of Keely it appears that these checks were a sort of combined voucher and check, which were first to be signed and authorized by McDougall and McClelland who were in charge of the property. Keely's testimony upon this point is as follows:

"Q. No, you would not pay them until you had the other two names, as you say?

A. The signature card stated that they should be signed by Messrs. McClelland and McDougall, and then

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I could complete the check by signing it and turning it over to any body, without any investigation; in other words I was not expected as treasurer of the company to investigate anything; they were supposed to check up all bills together, and pass them up to me as sort of an auditing committee, and then I simply appended my signature to the check to complete it, so the teller would pass out the money."

The books of the Union Dump Company were not introduced in evidence, but trial balances from these books were, and to which there is no objection as to accuracy. These show that at all times the property was carried as an asset of the company to the extent of $5,000, and that the deferred payments on the property were carried as liabilities, so long as they remained unpaid; the account as closed showing the one item of $1,000 remaining under the head of bills payable. It likewise appears that each of the four alleged partners received $1,591.93 in dividends.

The first of these trial balances is dated January 2, 1899 and the last February 22, 1904. The $2,000 note to the bank, and two of the deferred payments in the sum of $1,000 each, were paid directly from the treasury of the Union Dumping Company, by checks drawn on that company. Keely says the agreement was not for one-half of the profits to himself and Ross-Lewin but for a sum equal to one-half of the profits. This is a distinction without a difference. Beside the fact remains that the dividends were paid to all alike out of the receipts from the venture and upon checks drawn upon such fund signed by Mr. Keely as treasurer of the fund.

There is another circumstance presented by the plaintiff viz.: the institution of a suit in the name of Keely against the city of Black Hawk, in which the property is situated, to enjoin the city from interfering with

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such property—the pleadings in that case were excluded by the court, but the essential facts were proven orally, and the complaint tendered, is in the record.

The complaint in that case, verified by the plaintiff Keely, alleged among other things:

"That the plaintiff was at all the times hereinafter mentioned and is now the owner in fee simple and in possession of those certain pieces and parcels of land situate, lying and being in the County of Gilpin and State of Colorado, described as follows, to-wit: (Here follows a description of the property).

That the plaintiff was at all the times hereinafter mentioned and is now the owner of a large amount of goods, chattels and personal property described and known as smelter slag, which said smelter slag is of great value and contains great values of precious metals both gold and silver; that the said smelter slag was at all the times herein mentioned, has been and is now stored, piled and situate on the said premises hereinbefore described; that the said slag has an assay value of fifteen ($15.00) dollars and upwards per ton; that the plaintiff has heretofore been removing, hauling, shipping, selling, and disposing of large quantities of said slag from said premises, and has found the same to be merchantable and valuable on account of the gold and silver metal therein contained, and is desirous of continuing to sell and dispose of the remaining part and portion of the said slag, the goods, chattels and property of this plaintiff; that the plaintiff had been removing from said premises said slag and personal property for a long time, and up until on or about the 15th day of September, A. D. 1899, when the plaintiff was unlawfully interrupted and interfered with in such removals of the said goods, chattels and property, by the defendant herein, its officers, agents and employes."

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This testimony was competent as tending to affect the testimony of Keely, that he was not interested in the property. Keely explains this by saying that the attorney for the Dump Company insisted that it was necessary that the suit should be instituted in his name for the reason that the record title to the property was in him.

In that action there was a prayer for injunction, and for damages in the sum of $5,000.

It must at least be regarded as surprising that a man possessing the business acumen and experience expected of the cashier of the First National Bank of Denver would lend his name and verify such statements, in a suit of that character, when he had no interest in the matter.

The question to be determined is, do the facts and circumstances as so disclosed by the record, constitute in law a partnership as affecting third persons.

It does not appear that the plaintiff at the time of the sale had any knowledge of the arrangement between the alleged partners.

It is contended that the proof does not show an intent of the parties at the time, to create a partnership, and for such reason there was no partnership. It is true there was no written partnership agreement between the alleged partners, nor does it appear that the word partnership was used, but the intent may be inferred from the acts and conduct of the partners, and clearly there was no agreement that the transaction should not constitute a partnership. Specific intent is not necessary to the formation of a partnership:

"It is possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even

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expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. Burdick on Partnership, p. 18."

It is also urged that a division of profits does not constitute a partnership, and *Le Fevre v. Castagino,* 5 Colo. 564, and *Baldwin v. Patrick,* 39 Colo. 347, 91 Pac. 828 are cited. This court has uniformly held that the sharing of profits does not of itself necessarily constitute a partnership. But it is the rule in all jurisdictions that the fact that a person shares the profits of a business, tends to show that he is a partner therein, 30 Cyc. 386.

It is also urged that the transaction was a mere loan of money by the bank to McDougall and McClelland upon the credit of Ross-Lewin and Keely, and therefore does not tend to create a partnership, and many cases are cited wherein loans of money were made, and a sharing of profits agreed upon in lieu of interest, and wherein it has been held that such circumstances alone do not constitute a partnership.

The rule of law upon this subject is stated in 30 Cyc. 368, to be:

"One who makes a bona fide loan of money or credit to the owner of a business, in consideration of a share of its profits in lieu of interest, does not thereby become liable to the creditors of the business, in England, or in most of the American jurisdictions. It has been held in a number of cases, however, that if the loan is a contribution to the capital of the business, or if the profits are to be shared as profits, and not as a measure of compensation for the loan, the contracting parties are partners as to third persons, although their contract denies such relationship."

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But in this case McClelland and McDougall were not engaged in the business until after the arrangement with Ross-Lewin and Keely.

The note to the bank, signed by McDougall and McClelland, together with the interest thereon at the rate of ten per cent per annum, was paid out of the proceeds of the business, before any profits or dividends were paid. Therefore this is not a case where there was an agreement to share profits in lieu of interest upon a loan.

It is insisted that there was nothing said in the agreement as to losses, and for such reason there was no partnership.

While the sharing of losses is an incident of partnership, it has been held that the right to participate in profits implies a corresponding liability for losses, and that though there is no clause in the contract saying that either party was to bear the losses, in the absence of evidence to the contrary, the law presumes that losses were to be borne by them in the same proportion in which they shared the profits. *Lee v. Cravens,* 9 Colo. App. 273, 48 Pac. 149; *Ramsay v. Meade,* 37 Colo. 465, 86 Pac. 1018.

The parties constituting the alleged partnership must be presumed to have intended the very things they did, in the conduct of the whole matter, particularly in view of the fact that it is not contended here that any one of them performed a single act without the agreement of all the others.

McDougall and McClelland had been offered the property upon the terms stated. They were without funds to make the initial payment. They applied to Ross-Lewin and Keely as officers of the First National Bank for a loan from the bank for the required amount. This was refused and they then represented to Ross-Lewin and Keely that the scheme would be profitable, and that

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they would share one-half the profits, if the latter would secure the use of the money to make the initial payment for the property. Ross-Lewin and Keely accepted the proposition, and agreed to "take a flyer." If this term means anything, it means to share in the proposition. Clearly everything after this was with mutual knowledge and understanding of all the parties. On the same day McDougall and McClelland executed their note to the bank for the amount of the first payment. This was guaranteed by Ross-Lewin and Keely. Thus and thus only, was the money secured. This was paid to the plaintiff, which executed its deed to McDougall, McClelland was not included. McDougall and McClelland executed their joint notes for the deferred payments and McDougall then conveyed the premises to Keely, who continued to hold the title. But the note to the bank was paid August 25, 1898, and if the deed to Keely was to secure this loan by the bank, it should have been released or cancelled at that time. But this was not done nor offered to be done by Keely, until after the close of the partnership affairs, which continued until 1904, or more than five years after the payment of the bank note. On June 21, 1901, or nearly three years after the payment of the bank note, Keely instituted the suit against the city of Black Hawk as before stated, upon his verified complaint claiming ownership of the property. Certainly the bank could not so use a security, after the debt it had been given to secure, was fully paid.

If Keely was not holding the title for the partnership why under this state of facts did he not transfer the title to those whom he claims were the real owners, rather than to personally institute that suit.

Keely says that prior to this suit he offered to transfer the title to the plaintiff. But if he holds the title

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only as security for the payment to the bank of a note long since paid, by what right or authority can he convey the premises to the plaintiff.

Counsel for defendant in error rely on and cite many cases, wherein the division of profits have been held to be either in lieu of interest for money loaned, or in the nature of compensation for services rendered. It has been shown that in the case at bar, it was not in lieu of interest, and it was likewise not for services rendered.

No one of the four persons contributed a dollar to the enterprise. The money with which the advance payment was made was obtained upon the joint promises of all to the bank, in the form of a note and written guarantee. It was obtained for the common benefit of all—an equal division of the profits of the undertaking. It was paid out of the profits of the enterprise. It was the joint investment of credit to that extent.

The business was conducted in the name of the Union Dump Company, an unincorporated association, which under the law is held to be a partnership, whoever may have been the parties to it.

Keely was its treasurer. The funds were kept in the bank and under the surveillance of Ross-Lewin and Keely. All receipts were paid into this fund. All payments, including the purchase price of the land, the debt to the bank, expense of operation and dividends, were paid out of this fund upon the signatures of three of the parties, including Keely, the treasurer of the concern. The dividends were exactly equal. It is not contended that this was without the joint agreement and understanding of all.

The acts and conduct of all the parties, so appearing from the record, clearly constitute a partnership in law:

"It is sometimes said that, in order to constitute a partnership, the parties must have intended to assume

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that relation towards each other. But by this it is meant to say they must have intended to make such stipulation as in law constitute a partnership, and not that they intended the conclusion without regard to the conditions upon which it results as matter of law. It certainly cannot be meant to say that, where the parties have entered into an agreement which contains all the incidents of a partnership, the mere unexpressed mental apprehension of its effect will control the legal consequences. 'If' says Lindley, 'they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement.' 1 Lindl. Partn. (5th Ed.) 11."

It having been found that Keely was a partner, there is no serious contention as to his liability. 30 Cyc. 397.

The judgment is reversed with instruction to the trial court to enter judgment in favor of the plaintiff and against the defendant Keely for the amount found to be due.

MUSSER, C. J. and GARRIGUES, J., concur.

[No. 8043.]

WOLVERTON V. MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.

1. PUBLIC SERVICE CORPORATIONS—*Rules—Regulations—Discriminations.* A public service corporation is under duty to render equal service to all, without discrimination as to rates or facilities. Even a contract to render service to a particular patron, at a particular rate of compensation, valid when made, will not justify a continuance of the service at the agreed rate, when, subsequently a higher rate is *prescribed* to and exacted from the public. (62, 63)

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2. ——*Legislative Control.* The rates exacted by a public service corporation are subject to legislative regulation. (62)

The courts have no authority to prescribe rates for the service. (65)

3. TELEPHONE COMPANIES—*Duty to the Public.* Telephone companies are under duty to extend to all their patrons the same service, and at the same rates where the conditions are the same.

Every citizen of the community where such a company operates is entitled to have a telephone instrument installed in his premises, and to receive the same service, at the same rates as others, under similar conditions; and this right does not depend upon contract, but upon the fact that the company is a public service corporation, and owes the same service, at the same reasonable rate, to every member of the community. (63)

4. ——*House Service—Business Service.* There is a difference in the value of the telephone service rendered to premises occupied merely as a residence, and premises occupied for business, and a reasonable difference may be made in the rate charged. A contract to render telephone service to a residence will not entitle the citizen to the installation of an instrument in a new place of residence, where it is to be devoted to carrying on business. (62, 63)

5. SPECIFIC PERFORMANCE—*Revocable Contract.* Equity never interferes to enforce a contract where the party sought to be charged has reserved to himself, or the law confers upon him, the right of revocation. (64)

The contract of a public service corporation to render service to a particular patron at a particular rate for a specified time, is within the rule; because no public service corporation can lawfully enter into such a contract. (64, 65)

Error to Boulder District Court.—Hon. NEIL F. GRAHAM, Judge.

Mr. HOWARD L. HONAN and Mr. W. G. HOUSTON, for plaintiff in error.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. W. H. FERGUSON, Mr. JOSEPH SAMPSON and Mr. ELMER L. BROCK, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

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The complaint in this case alleges that the plaintiff, a citizen of the city of Boulder, had a residence telephone installed in his dwelling by the Colorado Telephone Company, on the 9th day of March, 1904. That later the defendant, the Mountain States Telephone Company succeeded to the business and rights of the Colorado Telephone Company.

The telephone remained in the house, and so in use of the plaintiff, until the 14th day of February, 1912. On that day the plaintiff removed to another place of residence, and the defendant refused to install another telephone at the new place of residence under the terms of the original contract.

The telephone was installed originally under the usual application and contract. The price to be paid under this contract was one dollar and fifty cents per month, or four dollars and fifty cents per quarter, with additional pay for excess calls, and a fee of five dollars for installation. It was provided in the contract that:

"The Colorado Telephone Company may terminate the subscriber's rights by written notice served on the subscriber or any occupant of the premises and sever his connection and remove the instrument for non-payment of the rental provided for herein or for any use of the telephone by the subscriber contrary to this request, etc."

The complaint also alleged that the defendant presented a bill for the use of the telephone on the 1st day of February, 1912, for service for that full month which plaintiff then paid, and further, that the plaintiff has complied with all the conditions of the contract.

It was further alleged in the complaint:

"That the plaintiff is engaged in the life insurance business, and during a great portion of said time maintained an agency at his residence at 1728 Grove Street, in the said city of Boulder, where said telephone service

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was rendered as aforesaid; and that at said residence Vera Wolverton, his wife, for the joint benefit of herself and this plaintiff, maintained a fire insurance agency, and that both this plaintiff and his wife, Vera Wolverton, have built up a large business in their respective agencies in the cities, town, and localities included within the territory covered by said contract as aforesaid. That this plaintiff, and the said Vera Wolverton, and also their customers have become accustomed to transact much of the business in regard to their insurance and other business, by means of the telephone, and that this plaintiff and the said Vera Wolverton have frequent occasion to call up customers, and to transact various other kinds of business in the several towns and adjacent communities covered by said contract, and people within said territory have frequent occasion to call up plaintiff and his wife on matters of business. That the character of the business being carried on by plaintiff and his wife is such that quick, prompt and reliable service and communication is essential, and that the discontinuance of said telephone service, and the disconnection and removal of said telephone, and the refusal to furnish service under the said contract, is working and will continue to work irreparable injury to this plaintiff, by causing dissatisfaction among said customers and inevitable loss of business."

There are further allegations of repeated requests to install and maintain the telephone in accordance with the terms of said contract, and at the new place of residence.

It is also alleged that the defendant is a public utility corporation, and that there is no other service of like character being rendered to the citizens of Boulder, and none other available to the plaintiff and his wife in carrying on their business.

The prayer was for a temporary mandatory injunction to compel the defendant to install and maintain a

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telephone instrument at the new place of residence, and render service to the plaintiff in accordance with the terms of said contract, for damages and costs.

A general demurrer was sustained to the complaint, and this is assigned as error.

It will be seen that the demand of the plaintiff is for the installation of a telephone for business purposes, and the damage claimed is for injury to plaintiffs business.

The contract with the Colorado Telephone Company was for residence purposes alone, and shows this to be an entirely different class, with different charges than for business purposes.

The complaint does not allege that the plaintiff has tendered or offered to pay, the usual and customary rate for such purpose, or the reasonable value of such service, or a reasonable rate for any service whatsoever.

Telephone companies are public service corporations and their instruments and apparatus are therefore devoted to a public use, and by reason of various valuable rights and franchises granted by the public are subject to certain well understood duties and obligations, without discrimination, to the public generally, and are bound to conduct their business in a manner conducive to the public benefit. They are likewise subject to legislative regulation and control. These companies may not arbitrarily refuse their facilities to any person desiring them, and offering to comply with their regulations, subject to the provision that rates and regulations must be reasonable.

That there is reasonably a difference in the value of such services, as between business and residence purposes, and that such difference in the rates charged by such public service companies, is common and usual, is well understood. So that in this case, even if we were

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to hold the contract binding, for continued use as a residence phone, it cannot apply in case of use for business purposes, which appears to be the clear demand of the plaintiff.

The complaint does not allege public regulation as to rates, nor a customary rate charged for the service demanded, nor what is a reasonable rate therefor, nor a tender of any such sum. The right of the plaintiff, as a resident of the city of Boulder to have a telephone installed in his home or place of business, and to the use thereof, is not dependent upon contract, but upon the fact that the defendant is a public service corporation, with its attendant obligations to the public by reason thereof, and the plaintiffs willingness to pay the reasonable rates for such service, and to otherwise comply with the defendants reasonable regulations, applicable to all alike, and without discrimination.

But it must be conceded that the plaintiff could at any time have terminated the contract, under its own terms, at will. There is no agreement that the contract will continue for any definite period.

It requires no argument to show that such contracts with public service corporations, for fixed period are impracticable, if not impossible from their very nature. The service is a public service and subject to a constant change of conditions.

It is clear that if the telephone company should reduce its rates for service to the public generally, it could not continue to hold the plaintiff indefinitely, under a contract for a higher rate.

The rule as to the enforcement of contracts wanting in mutuality was stated by Judge Cooley in *Rust v. Conrod,* 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720; to be:

"But the court will also refuse to interfere in any case where if it were to do so, one of the parties might nullify its action through the exercise of a discretion

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which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any irregularity, inequality or unfairness, but is sufficiently based upon the impropriety of imposing upon the judge, the labor and upon the public, the expense, of an investigation of reports, when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. All contracts where the party has reserved to himself, or where the law gives him, the authority to render nugatory any decree that ought to be rendered in their enforcement rest upon the same principle. This was recognized in *Rutland Marble Company v. Ripley,* 10 Wall. 339, 359 [19 L. Ed. 555] and more distinctly asserted and decided in *Express Co. v. Railroad Co.,* 99 U. S. 191, 25 L. Ed. 319. In this last case the very strong assertion is made that a court of equity never interferes where the power of revocation exists."

As to the application of this rule in case of contracts with public utilities for service see *Fowler Utilities Co. v. Gray,* 168 Ind. 1, 79 N. E. 787, 7 L. R. A. (N. S.) 726, 120 Am. St. 344.

2, Wyman on Public Service Corporations well states the reason for the rule of non-enforcement of such contracts with public service corporations as follows:

"A troublesome problem arises when the continuing to render service at certain rates fixed by a contract which was legal when it was made, comes into conflict with new rates later scheduled, by which the public generally are called upon to pay higher rates. It once seems to have been thought that a continuing contract to take shipments must be respected when rates generally are raised. In those days it will be remembered any concessions for which anything could be said was held justifiable. But of late with the stringent law against all dis-

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crimination, and the insistent enforcement of it, even a definite contract still continuing by its terms is held no justification for giving to the particular customer lower rates than those called for from all, by the present schedule. Once the policy against discrimination is well established there is no difficulty in saying that for reasons of public policy no further obligation attaches to such a contract. To the argument that the contract may have been valid when made, if it fixed the rate then charged all, and that therefore the subsequent action of the railroad in advancing rates generally could not invalidate it, the United States Supreme Court replied recently: 'This contention loses sight of the central and controlling purposes of the law, which is to require shippers to be treated alike, and that the filed and published rate, shall be equally known by and available to every shipper.' "

And it is now held that even in case of such contracts with public utilities for specific rates and for definite periods of time, these are subject to legislative acts of regulation. *Louisville & Nashville Ry. v. Mottley,* 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Southern Wire Co. v. St. Louis &c. Co.,* 38 Mo. App. 111.

In addition to what has been said, it has been held that such a judgment as is prayed for in this case, would be in effect the fixing of a rate by the court. *Nebraska Tel. Co. v. State,* 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113.

It is universally held that the power to fix a rate or regulation in such case is exclusively a legislative function, and that the courts may determine the question of reasonableness alone.

It is quite clear in this case that the court is asked to perpetuate a contract between the parties as it relates to a rate once agreed on, for residence purposes, and also to make it apply to a business purpose, and which

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may or may not be at this time reasonable. Courts have no such power. *Colorado Tel. Co. v. Wilmore*, 53 Colo. 591.

The judgment is affirmed.

MUSSER, C. J. and GARRIGUES, J., concur.

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SEPTEMBER TERM

[No. 7147.]

COUNTY OF OURAY v. COUNTY OF SAN JUAN.

1. COUNTY BOUNDARIES—*How Established?* only by statute, not by the acts or omissions of the county officials. (72)

2. ——*Proceeding to Establish, an Action.* The State Engineer having, under Rev. Stat. Sec. 1162 established the boundary between contiguous counties, a proceeding instituted by one of them, under the statute, to correct alleged errors of the State Engineer, is an equitable action, and not a special proceeding. (69)

3. ——*Change of Venue.* No jury being required, the county defendant is not entitled to a change of venue on account of the prejudice of the inhabitants of the county plaintiff, in which the action is instituted. (69, 70)

4. PLEADING—*Separate Causes of Action.* The denial of a motion to require the separate statement, is error. (71)

5. ——*Construed.* A complaint setting forth (1) The establishment of a county line by the State Engineer, and that the plaintiff county is dissatisfied therewith, (2) The long recognition by both counties and the inhabitants and officials thereof, of the particular line for which the plaintiff contends, contains two separate causes of action, one the action authorized by the statute, and the other an attempt to set up an estoppel. (70, 71)

6. APPEAL AND ERROR—*Trial by Court—Incompetent Evidence Admitted—Presumption that the court in its findings rejected it,* will not be indulged, where, from its rulings upon the pleadings it appears that the court misconceived the law, it being impossible in such case for the court of review to say that the findings below were not founded upon the evidence improperly received. (73, 74)

Error to the San Juan District Court.—Hon. CHARLES A. PIKE, Judge.

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Mr. JOHN T. BARNETT, for plaintiff in error.

Mr. WILLIAM A. WAY, Mr. J. CYRIL DUNN, Messrs. RUSSELL & REESE, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This action was instituted under the provisions of Section 1162, R. S. 1908. The complaint discloses that upon the petition of Ouray County the state engineer, as authorized by this section, proceeded in the manner therein described to establish the boundary line between San Juan and Ouray counties, and in due time furnished the board of county commissioners of each of said counties with the description thereof. San Juan county being dissatisfied with the line as thus fixed instituted this action in the district court of San Juan county for the purpose of having the court determine and settle this disputed line between these counties. The complaint alleges that the boundary line as located by the state engineer is erroneous in that it does not pass through the junction of Mineral creek and the main branch of the Uncompahgre river, but is located some distance south of said junction, causing a loss of territory to San Juan county. The statute defining the boundary in dispute reads:

"Commencing at a point on the boundary line between the counties of Hinsdale and San Juan, due east of the junction of Mineral creek and the main branch of the Uncompahgre river; thence due west through said junction to the summit of the divide between Red Mountain Valley and Poughkeepsie Gulch." General Laws 1877, page 207.

It will thus be observed that the contention is not as to any ambiguity in the language of the statute, but as to where the junction of Mineral Creek and the main branch of the Uncompahgre river is.

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The defendant in apt time moved for a change of venue, upon the ground that the inhabitants of San Juan county were all interested in the matter in dispute, and therefore prejudiced by reason of which a fair trial could not be had in said county.

This motion was supported by affidavits. Counter affidavits were filed resisting it. The motion was denied. This is the first assignment of error urged. This case does not come within the class enumerated in Section 173 of the code entitled to be tried by a jury. This position is not seriously disputed but it is contended that it is a special proceeding unknown to the common law and in no proper sense of the term an action. We cannot agree with this position. Section 1162, *supra,* provides that if either county is dissatisfied with the line as thus fixed by the state engineer, it may commence an action in a court of competent jurisdiction in this state to determine and settle such disputed line. It will thus be observed that no special proceeding is provided, nor any method set forth for reviewing the action of the state engineer, but the act provides that his action shall be final unless a suit is brought within a certain time in a court of competent jurisdiction to have the line determined and its location settled. There is no method of procedure prescribed to be followed; no special tribunal is created, and no jurisdiction attempted to be conferred beyond that already possessed by the courts, but to the contrary it provides that a suit may be instituted in a court of competent jurisdiction to settle the question. In *Rhode Island v. Massachusetts,* 12 Peters, at 734, 9 L. Ed. 1233, it was stated:

"No court acts differently in deciding on boundary between States, than on lines between separate tracts of land. If there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlock-

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ing grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud, or time, or other kindred causes, it is a case appropriate to equity."

This rule appears to have been recognized and followed by that court ever since. *Rhode Island v. Massachusetts,* 14 Peters, 251, 10 L. Ed. 423; *United States v. Texas,* 143 U. S. 621, 36 L. Ed. 285.

In the case last cited the question was again gone over and it was held that the suit by the United States against Texas to determine the boundary line between that state and other territory of the United States was in equity. Upon this question after citing many cases, the court said "It is scarcely necessary for the court to examine this question anew." It is the character of the action and not the nature of the issue which determines whether it must be tried by a jury or by the court. *Danielson et al. v. Gude,* 11 Colo. 87, 17 Pac. 283. The case at bar being one where a jury is not provided by Section 173 of the Code and the action being equitable in its character, the court committed no error in denying the motion.

In paragraph 11 of its complaint the plaintiff alleges that for many years the officers of both San Juan and Ouray counties, and the citizens and residents of these counties did recognize, treat and acquiesce in said boundary line as being established at a certain place (in the complaint described), and that both of said counties did assess, levy and collect taxes on property in recognition of, and acquiescence in, said line, and worked and improved the roads and public trails, and held and conducted elections, in recognition of, and acquiescence in, said boundary line as being at a certain place, and that in recognition of, and acquiescence in, and dependence upon, said line as so recognized by said two counties the

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citizens made many locations and conveyances of mining property, treating all properties south of said recognized line as being situated in San Juan county; and did record for said locations and conveyances in said San Juan county accordingly, and that in other ways said counties, and the people thereof recognized said line at a certain place, etc. It is then alleged that because of these matters it would be inequitable and unjust to establish said boundary line on the line laid out by the state engineer, and that Ouray county should be estopped from claiming or undertaking to establish said boundary line south of the line described. The line described in the complaint was the one determined and settled by the court as the correct line. A motion to strike this paragraph was overruled. The defendant then moved to require the plaintiff to state its causes of action separately. This motion was likewise overruled. A refusal to order a separation of causes of action pleaded in one statement is error. *Hall v. Cudahy,* 46 Colo. 324, 104 Pac. 415. There was unquestionably an attempt to set forth two causes of action in the complaint; the first was, that there was a dispute as to the boundary line that the state engineer had located it in compliance with the statute; that San Juan county was dissatisfied with his decision and brought this action to have the court determine and locate this line. This is the cause of action provided by statute. The second consisted of the acts of recognition and acquiescence in a boundary line by the officers of both counties and the citizens thereof, upon account of which it was sought to estop the defendant from asserting its claim to a different line. Had the causes of action been separately stated the second could have been tested by demurrer, in which case it must have been found bad for it attempts to secure to the plaintiff the territory in dispute by estoppel.

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Whatever may be the rule in other jurisdictions it is settled in this, that a county line is not determined by the actions of omission or commission of public officers, but by legislative enactment. In *Hinsdale County v. Mineral County,* 9 Colo. App. 368, at 382, 48 Pac. 675, 680, the court said:

"Counsel say that for some time before the attempted boundary adjustment, Saguache county had exercised dominion over the territory, in dispute, and had claimed, and successfully asserted, the right to collect taxes in that territory. It does not appear that the claim was ever the subject of adjudication, or that the right which counsel say was 'successfully asserted' was asserted in the courts. If Saguache county exercised such authority, it simply assumed it, acting on its own construction of the statute; and in so far as it exercised dominion over territory which did not belong to it, its assertion of its alleged right was usurpation. Saguache county is not a county by prescription. It was created by statute. Outside of statute it has no existence, and all its territorial rights are derived from statute. It has, and can have, no territory except what the statute gives it."

To the same effect in principle is *Grand County v. Larimer County,* 9 Colo. 268, 11 Pac. 193, which holds that a boundary line cannot be determined by the action of county officers, but by the law itself properly interpreted.

Upon the overruling of these motions, the defendant by answer put in issue all matters of fact pertaining to this boundary line, also the recognition and acquiescence, facts, etc., alleged pertaining to it. The evidence is quite voluminous and conflicting upon all of these questions. It is claimed by the plaintiff in error that it is wholly insufficient to support the finding upon any theory con-

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tained in the pleading, and that there is an entire lack of competent evidence to sustain the finding that the line as thus fixed is the one designated in the statute. Had there been no evidence offered to support an alleged cause of action under the theory of estoppel, we would deem it proper to consider and pass upon the contention of the defendant in error that by answering to the merits the defendant under the circumstances of this case, waived the right to be heard concerning the ruling upon its motions. Upon the other hand, had the motion to strike been granted, or the motion to separate been sustained, and a demurrer to the plea of estoppel been held good, and the evidence concerning the question of acquiescence and recognition have been admitted, we would then deem it necessary to pass upon the contention of the defendant in error that though this evidence was incompetent the trial being to the court it is presumed to have considered only the competent evidence in making its findings, etc., also the contention that part of this evidence at least is competent in support of the fact as to what point was understood and recognized as being the intersection of the main branch of the Uncompahgre river and Mineral Creek in the early days, etc., and some of which evidence was unquestionably competent for this purpose. But we have not such a record before us. To the contrary, it discloses that the trial court received this evidence or a part of it under a misconception of the law and must have thus considered it. This is clearly disclosed by its rulings upon the pleadings; for this reason we are unable to ascertain the extent of the influence this evidence may have had in the mind of the court in arriving at its conclusion, and although there is evidence as contended to support its findings of fact, it is impossible for us to say that it did not arrive at this conclusion by giving weight to its misconception of the law upon the

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issue of estoppel. In *Davis v. Pursel,* 55 Colo. 287, 134 Pac. 107, it is said:

"If the decree is supported by the evidence, under a proper conception of the law, it should not be disturbed, though the reviewing tribunal might have, if passing upon the matter in the first instance, reached a different conclusion."

Many authorities are cited in support of this statement. On the other hand, if it appears that the trial court has received incompetent evidence under a misconception of the law, the judgment should be reversed, unless this court can say that upon the evidence as a whole, regardless of such facts, the verdict should be as it is. *Perot v. Cooper,* 17 Colo. 80, 28 Pac. 391, 31 Am. St. 258.

As heretofore stated the evidence is conflicting upon the main point at issue, to-wit., as to where the junction of Mineral creek and the main branch of the Uncompahgre river is. A finding sustaining the contention of either party might be said to be supported by competent evidence; for which reason, including the matters hereinbefore referred to, we do not think it would be proper for us at this time to attempt to make an effort to ascertain upon which side of the controversy the preponderance of the evidence is; that is the province of a trial court. It is a matter of importance to both counties; property of considerable value for the purpose of taxation is involved, and in disposing of the contention counsel upon both sides should make every effort to prevent any necessity for its future consideration by this court. The leading counsel for the defendant in error, having been elevated to the bench of the district which includes the county in which the action was tried, is relieved from the unpleasant duty of presiding in the matter. Upon account of these counties being in separate judicial districts, we suggest, as a question of propriety, that it

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might be advisable to have it disposed of by a judge other than those presiding in either of these districts, and that in case the judge who hears it desires the assistance of a jury to aid him in determining the questions of fact involved, then the cause should be transferred to a county other than the parties to the action. We are not impressed with the argument of counsel for the defendant in error that because they produced more affidavits than the other county concerning the interest, bias or prejudices of the inhabitants of that county pertaining to a fair trial by a jury, that this is convincing that a fair and impartial jury could be secured in a small county thus interested.

For the reasons stated the judgment is reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed.

Chief Justice Musser and Mr. Justice Gabbert concur.

Decided March 2, A. D. 1914. Rehearing denied November 2, A. D. 1914.

[No. 7641.]

DeBaca v. Higgins.

1. Bank—*Officer Applying the Funds of the Bank to his Private Debt.* An agent has no authority to apply the funds of his principal to his private obligations. No more has the officer of a bank. He has charge of the funds of the bank as trustee for the stockholders and creditors of the institution. (79)

A creditor of an official of a bank, receiving in payment of his demand a draft or other obligation of the bank, showing upon its face

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that it is issued by such official, is advised thereby of the improper appropriation of the funds of the bank, so attempted. The paper is void in his hands, and if he obtains the money upon it he is liable therefor to the bank, or the receiver of the bank, unless he can show that the act was authorized by the proper authorities of the bank, or that they afterwards ratified it. (79)

The fact that the official of the bank, in such case is the owner of the whole stock thereof, conducts all its business and is not subordinate to any superior authority in the premises is unimportant. (79, 80)

2. ESTOPPEL—*By Conduct—Ratification.* Bowlds bought the whole issue of stock of a bank and assumed control of its business. He pledged certain shares to another bank to secure a loan. Subsequently, having no funds at all in the bank and being indebted to plaintiff, he drew a draft in the name of the bank for a portion of the debt, and a certificate of deposit for the residue. No other officer of the bank knew of the transaction. Plaintiff collected the draft, and shortly thereafter the bank failed, and its affairs passed into the hands of a receiver, the loan from the other bank remaining unpaid. *Held* that the failure of the bank, while so under the control of Bowlds, to repudiate the transaction, raised no estoppel either upon the bank or the receiver. Judgment in favor of the receiver for the amount of the draft, and disallowing the certificate of deposit as a claim against him. Affirmed. (79, 80)

Error to Arapahoe District Court.—Hon. CHARLES MCCALL, Judge.

Mr. WALTER M. APPEL, for plaintiff in error.

Messrs. DANA & BLOUNT, for defendant in error.

Messrs. DOUD & FOWLER, for Central Savings Bank, intervenor.

The Bank of Grand County was a corporation organized under the laws of this state. One C. H. Bowlds, purchased the entire capital stock of the bank, which was transferred to him. At the time of this purchase a meeting of the board of directors was held, and Bowlds elected director and president, and one Norment director and

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vice-president, but no third director was elected, nor was a cashier elected. Bowlds took possession of the bank, and managed and controlled its business. One Furgerson remained in the employ of the bank and appears to have acted in the capacity of cashier. Bowlds was indebted to plaintiff in error on a promissory note in the sum of five thousand dollars and interest. During the absence of Furgerson, Bowlds took up this note by giving his check on the bank for seven hundred sixty-two dollars and fifty cents, a draft signed by himself as cashier for one thousand dollars, and a certificate of deposit for four thousand dollars, payable four months after date, which was also signed by him as cashier, each of which was payable to plaintiff in error. The draft and check were paid in due course. At the time of this transaction Bowlds did not have any funds to his credit in the bank. His account was overdrawn, and he never made any deposit to take care of either of these obligations. Two days prior to the issuance of these obligations, Bowlds pledged ninety shares of the stock of the bank to the Central National Bank as collateral security for five thousand dollars borrowed by him. Subsequently, and within thirty days, defendant, in error was appointed receiver of the bank. The loan of the Central National has not been paid and it still holds the stock pledged as security. Plaintiff in error filed his claim with the receiver for four thousand dollars, upon the certificate of deposit. The receiver objected to its allowance upon various grounds, which were to the effect that the certificate was issued in settlement of Bowlds' personal obligation, and without consideration to the bank. To these objections claimant replied to the effect that the bank was estopped to assert the authority of Bowlds to execute the certificate, and had been guilty of laches in failing to interpose objections to the validity of the certificate.

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Later the receiver filed a further answer and cross-complaint, praying judgment against the plaintiff in error upon the draft and check, upon the same grounds that he opposed the allowance of the claim on the certificate of deposit. The Central National Bank intervened, and objected to the claim of plaintiff in error, and claimed that by virtue of its ownership of the stock of the bank, pledged by Bowlds, it was entitled to all surplus in the hands of the receiver. The receiver had sufficient assets to pay all claims against the bank, except that of plaintiff in error, and approximately two thousand dollars in addition. The testimony at the trial established facts substantially as above narrated. The court rendered judgment disallowing the claim on the certificate of deposit and against plaintiff in error for the amount of the draft with interest. Claimant brings the case here for review on error.

Mr. Justice Gabbert delivered the opinion of the court:

The transaction by which plaintiff in error received the draft and certificate of deposit was a personal one with Bowlds, and not with the bank. By the issuance of these obligations Bowlds undertook to discharge his individual indebtedness to the plaintiff in error, by issuing a draft and certificate of deposit signed by him as cashier.

The official of a bank in charge of its business is its agent, but his authority is limited to those transactions in connection with the affairs of the bank, which are usually exercised by such officer, so that the test to apply in ascertaining if the bank he represents is bound by his act, is whether the transaction is with the bank and its business, or with the officer personally, and in his business. If of the latter character, the bank is not bound

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thereby, unless it appears that the act of the official for his individual benefit was authorized or ratified. An agent is not vested with authority to appropriate the funds of his principal to pay his debts, and therefore, a creditor of a bank official receiving a draft or other obligation of the bank, which the officer represents, in payment of his individual obligation, which show upon their face that they were issued by himself, is advised that thereby the officer is appropriating the assets of the bank to pay his individual indebtedness and is therefore liable to the bank for the funds so received, or the obligation is nugatory in his hands, unless he establishes that the bank official was authorized to issue such obligations, or his act has been ratified by the bank.—*Campbell v. Manufacturers Nat'l Bank,* 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. 468; Zane on Banks and Banking, 120; *Anderson v. Kissam,* C. C. 35 Fed. 699; *Hier v. Miller,* 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952; *Langon v. Grognon,* 123 La. 453, 49 So. 18, 22 L. R. A. (N. S.) 414; *St. Charles Sav. Bank v. Orthweir Inv. Co.* 160 Mo. App. 369, 140 S. W. 921.

Such proof was not made in the case at bar, and it appears that Bowlds never made any deposit with the bank to pay the draft or certificate of deposit.

It is urged, however, on behalf of plaintiff in error, that because Bowlds was the owner of the entire capital stock of the bank, transacted all its business, attended to all its affairs, was not subject to any authority in the conduct of the business of the bank, and because the bank remained silent, and made no objection to the authority of Bowlds to issue the certificate of deposit and the draft, the transaction was ratified, and both the bank and the receiver are estopped from questioning the validity of the transaction.

Bowlds, as we have stated, and as is claimed by plaintiff in error, was in full control of the affairs of the

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bank. He was therefore trustee for its stockholders and creditors. This fiduciary relation inhibited him making any use of the corporate assets, except such as might serve the purpose of the corporation. Consequently, he could not appropriate the funds of the bank to his own use, as against its creditors, and those having an interest in its stock. Prior to the transaction involved, he had transferred ninety shares of the capital stock to the Central National Bank, to secure his note to that institution. This note is unpaid. His attempt to discharge his individual indebtedness with the bank assets, was unquestionably wrong and illegal. He was the only one interested in the bank who appears to have had any knowledge of this wrongful act. In such circumstances his silence or acquiescence cannot bind his principal. To hold otherwise would enable a bank official, in sole charge of the affairs of a bank, to ratify his own wrongful act by his own silence and his own acquiescence. The law will not permit fraud to be perpetrated in this manner. We must not be understood, however, as intimating that plaintiff in error, or those representing him, were guilty of any fraud, for they were not. When we speak of fraud, we refer to the act of Bowlds in appropriating the funds of the bank to his own use to discharge his individual indebtedness. It was this fraud of which plaintiff in error had notice that vitiates the transaction.

The contention on the part of counsel for plaintiff in error that the judgment is erroneous is based entirely upon the proposition that the transaction was ratified, and therefore, binding on the bank, and in considering the case, we have merely assumed, but not decided, that it could have been ratified, either in advance or by subsequent action.

It is suggested in the brief of counsel for plaintiff in error that the receiver holds his note against Bowlds,

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and claims it as an asset of the bank. We do not understand the receiver makes any such claim. If he has the note, it should be turned over to the plaintiff in error.

The judgment of the District Court is affirmed.

Judgment affirmed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

Decided April 6, A. D. 1914. Rehearing denied November 2, A. D. 1914.

[No. 7954.]

TRINDLE ET AL. v. THE REGISTER PRINTING & PUBLISHING COMPANY ET AL.

1. REPLEVIN—*Effect of Verdict.* A verdict for the plaintiff fixing the total value of the goods, not valuing any item separately, is conclusive upon the defendant, and his surety in the redelivery bond. (85)

2. ——*Re-Delivery Bond*, executed by defendant, who by force thereof, under the statute, has return of the goods, is not satisfied by the delivery and acceptance of part of the goods in damaged condition. (85)

The whole of the chattels must be surrendered in like good order and condition as when replevined. (85)

3. ——*Parties—Dismissal of One Defendant*, in replevin, does not discharge the surety in the re-delivery bond. (86)

Error to Larimer District Court.—Hon. J. W. SHEAFOR, Judge.

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Messrs. CARLSON & COFFIN, Mr. JOHN H. SIMPSON, for plaintiffs in error.

Mr. MILTON SMITH, Mr. CHARLES R. BROCK, Mr. WILLIAM H. FERGUSON, for The Empire State Surety Company.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

The judgment here for review was the result of an action in the District Court, wherein plaintiffs in error sought to obtain a judgment against the defendants in error on a redelivery bond given by the defendants in a replevin action. The replevin action was prosecuted by these plaintiffs in error against The Register Printing and Publishing Company and one Houck. The defendants gave a redelivery bond for $7,000 with the Empire State Surety Company as surety, and the property was returned by the sheriff.

On a trial of the replevin action, the court found that Houck was not in possession of the property at the time of demand therefor, made before the replevin action was brought, nor at any time thereafter, and for that reason the replevin action was dismissed as to him. He was the president of the printing company. The court also found that the printing company retained possession of the property by the execution of the redelivery bond; that the printing company still had possession of it at the time of the judgment, and that the plaintiffs were entitled to the possession. It was adjudged that the plaintiffs have judgment for the possession of the property or in case delivery thereof cannot be had that they have judgment for the value of the said property, to-wit., the sum of $3,500. It was further adjudged that the plaintiffs have damages for $136.80 for the un-

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lawful detainer of the property and for their costs. After this judgment was rendered, a special execution was issued against the printing company, commanding the sheriff to put the plaintiffs in possession of the property, describing it, and that he make the sum of $136.80 and costs out of the property of the printing company.

To this execution the sheriff made return that he took possession of so much of the property as could be found and offered to return it to the plaintiffs; that a large portion of it could not be found; that the plaintiffs claimed that a large portion of what could be found had greatly deteriorated in value; that the defendant and the surety on the bond were notified of these facts, and the property found was appraised, and such as was found was listed by the sheriff and the value thereof as appraised was stated in his return.

In the action on the redelivery bond, the District Court found that on the trial of the replevin action the plaintiffs stated that they had no evidence against Houck, and could not ask for a judgment against him, and thereupon the court found as it did with respect to Houck, and dismissed the action as against him. The court further found that the sheriff executed the special execution by taking possession of the property set forth in the statement attached to his return, and that all of those articles so stated were delivered to the plaintiffs; that at the time of the delivery of the property to the plaintiffs, a portion of the property involved in the replevin suit could not be found, and that which was found and delivered to the plaintiffs was in a damaged condition, which greatly reduced its value, the value at the time of return being the sum of $471.60, which the plaintiffs credited upon the judgment in the replevin action; that there was nothing in the evidence upon which to determine the value at the time of the commencement of the replevin

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action of the articles returned to the plaintiff, nor to show the value of any of the property that could not be found. Upon these facts, the court found, as a matter of law, that the acceptance of a portion of the property in a damaged condition operated in law as a satisfaction of the judgment in replevin, and that the same effected a discharge of the surety on the redelivery bond. The court held that the plaintiffs were not entitled to recover and dismissed the action. The plaintiffs in error complain here of this action of the court. The redelivery bond, upon which the action was predicated, after reciting that the sheriff took the property from the possession of the defendants by virtue of the writ of replevin, and describing it, and that the defendants desired that the property be redelivered to them, proceeded as follows:

"Now, therefore, we the undersigned, in consideration of the premises and of the said re-delivery of the said property from the said plaintiff to the said defendants, do undertake, promise and acknowledge to the effect that we are jointly and severally bound unto the said plaintiff in the sum of seven thousand ($7,000) dollars (being double the value of the said property as stated in the affidavit of the plaintiff), for the delivery thereof to the said plaintiff, if such delivery be adjudged, and for the payment to them of such sum as may for any cause be recovered against the said defendants, and this defendant hereby waives any and all damages or costs to them as against the said sheriff by reason of his having made said levy."

In the replevin action, the delivery of the property to the plaintiffs was adjudged, and if delivery was not made they were to recover its value—$3,500. The property must be returned in like good order and condition as when replevied.—Wells on Replevin, (2d Ed.) Secs. 422, 484; Shinn on Replevin, Sec. 679.

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The court erred in holding that the acceptance of a portion of the goods operated as a satisfaction of the judgment in replevin and the release of the surety. The part returned to the plaintiffs, and for which they gave credit to the amount of its value when returned, operated only as a partial satisfaction.—*Franks v. Matson,* 211 Ill. 338, 71 N. E. 1011; *Wash. Ice Co. v. Webster,* 125 U. S. 426, 8 Sup. Ct. 947, 31 L. Ed. 799; *Yelton v. Slinkard,* 85 Ind. 190.

In the present case it matters little how the measure of damages with reference to the return of the property is stated for it amounts to the same thing whether it is said that the measure is the difference between the value of the property returned at the time of the return, and the value of all the property as determined in the replevin action, or that it is the value at the time of the original demand of the property not returned plus the depreciation in value of that returned. In the judgment in the replevin action the value of all the property was fixed at $3,500 at the time of the original demand. The items were not valued separately. The value thus fixed was conclusive upon the defendant and its surety. *Cantrell v. Babcock,* 11 Colo. 143. If the value of the part returned was $1,000 at the time of the original demand, then the value of that not returned must have been $2,500. The value of that returned was $471 when returned, and if its former value was $1,000 the depreciation in it would have been $529. If to this depreciation, there be added $2,500—the value of that not returned—the result would be $3,029. If from the value of all the property, $3,500, there be taken $471, the value when returned of that returned, the result would be the same, $3,029. In any event, it is plain that the plaintiffs were entitled to $3,500 worth of property and they only received $471 worth. We are inclined to think that if a man owes another

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$3,500 and pays but $471 he would still owe $3,029, no matter in what form the measure of damages may be stated.

In the replevin action, the court found that Houck was not in possession of the property at the date of the demand therefor, nor at any time thereafter, and for that reason dismissed the action as to him. This dismissal of the action as against Houck did not operate to discharge the surety as contended by defendants in error.—*Smith v. Atkinson,* 18 Colo. 255, 32 Pac. 425; *Auerbach v. Marks,* 10 Daly, 171.

The judgment is reversed and the cause remanded with directions to proceed in accordance with the views herein expressed.

Reversed and remanded.

Mr. JUSTICE GARRIGUES and Mr. JUSTICE SCOTT concur.

On hearing of a motion for rehearing in the foregoing matter, Mr. Justice Gabbert sitting in place of Mr. Justice Garrigues, the motion is denied.

[No. 7454.]

PINNACLE GOLD MINING COMPANY v. THE PEOPLE.

1. PLEADINGS—*Complaint—Separate Causes of Action.* The complaint of the Attorney General filed in May, 1910, demanded of the defendant corporation, in one count, the license tax for seven successive years, and the penalty prescribed by law for the non-payment of the tax. *Held* that the tax for each year, and the penalty thereon, constituted a separate cause of action. (89)

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2. ——*Failure to Separately State Separate Causes of Action. Remedy*, is by motion, not a demurrer for misjoinder of causes of action. (96)

3. ——*Joinder of Causes of Action.* A single action lies to recover from a corporation the annual license tax prescribed by statute for several years. Or several promissory notes. (96)

4. LEGISLATURE—*Call for Special Session, Construed.* The call for the special session of the general assembly of 1902 specified, among other subjects to which the assembly were required to direct their attention (1) To enact a revenue law providing for the assessment of property for taxation, and the levy and collection of taxes. (3) To enact any and all legislation relating to or in any wise affecting corporations. *Held* that the provisions of chapter 3 of the laws of that session imposing a special license tax upon certain corporations, and a penalty for its non-payment, was within the call, following *Parsons v. People* 32 Colo. 221. (90)

5. ACTION—*When an Action Lies—Special Remedy by Statute.* Section 64 of c 3 of the Acts of 1902 imposes a license tax upon certain corporations and sec. 68 prescribes a penalty for the non-payment of the tax. *Held* that although the statute also provides that every corporation defaulting shall forfeit its right to do business until the tax is paid, the state may maintain an action for the tax, and the penalty.—*Montezuma Co. v. Bell*, 20 Colo. Distinguished. (90)

6. CORPORATIONS—*Failure to Pay License Tax—From what Date Penalty Computed.* The penalty prescribed by sec. 68 of c. 3 of the laws of 1902, for the non-payment of the tax imposed by the statute is computed from the date of the notice given after the tax becomes due. (97)

A complaint for the penalty must aver such notice and the day upon which it was given. (97)

No notice is required under c. 211 of the Acts of 1907. (97)

7. ——*Continuing to do Business after Failure to Pay the Licence Tax*, is liable for the tax and the penalty for its non-payment, during the period of so continuing business. *Semble* if after the first default it had ceased to do business it might be otherwise. (93)

8. LIMITATIONS—*Action by State for Penalty.* An action by the State against a private corporation to recover the penalty prescribed by statute for the non-payment of a tax is not within Rev. Stat. Sec. 4068, barring an action for a penalty begun more than a year after the offense is committed. (93, 94)

Appeal from Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

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Mr. FRANKLIN E. BROOKS, Mr. MICHAEL B. HURLEY, Mr. GEORGE W. BIERBAUER, for appellant.

Hon. BENJAMIN GRIFFITH, Attorney General, Mr. GEORGE D. TALBOT, Special Counsel, Mr. CHARLES O'CONNOR, Assistant Attorney General.

Hon. FRED FARRAR, Attorney General, Mr. FRANCIS E. BOUCK, Deputy Attorney General, for the People.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

In May, 1910, the Attorney General filed a complaint to recover from the appellant company the annual corporation taxes for the years beginning with 1903 and ending with 1909. The complaint alleged that the company was a corporation organized and existing under the laws of Colorado during all the times mentioned, and was engaged in the business of mining, and had a capital stock of two million dollars.

In one paragraph of the complaint it was alleged that on the first day of May, 1903, the company became liable to pay to the state the sum of forty dollars as a state license tax, and a like sum became due from it as such tax on the first day of May of each of the succeeding years, to and including 1909.

It was further alleged in the complaint that due notice was annually given the company, by the authorized state officer, of the time when the said tax was due, together with a copy of the revenue law as required by law. It was alleged that the company had refused to pay the tax, and that under the revenue law it had become liable to penalties, amounting in the aggregate to $224.00. There were other allegations in the complaint which need not be mentioned.

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The company filed a motion to require the plaintiff to separately state the several causes of action, which it was asserted were commingled in the complant because it sought to recover separate taxes, for several different years, separate penalties, and both taxes and penalties, under different statutes, to-wit., the statute of 1902 and that of 1907. This motion was denied. The company then filed a demurrer to the complaint on the grounds: 1. That it did not state a cause of action in several specified particulars. 2. That the penalties sought to be recovered accrued more than one year prior to the commencement of the action and were barred by the one year statute of limitations. Sec. 4068 Rev. Stat. 3. That several causes of action were improperly united in the complaint specifying the alleged separate causes. The demurrer was overruled, the company elected to stand thereon and judgment was rendered against it as prayed for, from which judgment it appealed.

1. It is first insisted that the court erred in overruling the motion to separately state different causes of action claimed to have been commingled in the complaint. On behalf of the appellee, it is contended that there was but one cause of action stated. We are of the opinion that the tax for each year, with the penalties thereon, constituted a single and separate cause of action, so that there were several causes of action commingled in the complaint. It is held in *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. 415, that the code requirement, that different causes of action shall be separately stated when united in the same complaint, is mandatory. It is, therefore, error for a court to deny a motion for a separate statement when different causes of action are commingled. In as much as the judgment must be reversed on another point, and the state will have an opportunity to write the complaint as the code and rules require, we

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express no opinion as to whether the error was prejudicial or not.

2. In the demurrer, it was asserted that the complaint did not state facts sufficient to constitute a cause of action as to the taxes and penalties, or either of them, claimed under the law of 1902. It is claimed that this ground of demurrer was good for three reasons: First, because the levying of annual corporation taxes was not within the proclamation of the Governor convening the General Assembly in the extraordinary session, at which the law was passed, and hence the levy of such taxes was unconstitutional. Second, because there was no provision in the law of 1902 for any action to recover such taxes or penalties, and there was a remedy by forfeiture, which was exclusive. Third, as to penalties under the law of 1902, because the complaint did not allege the giving of notices, as required by Sec. 68 of that law.

The contention that the levy of the tax was not within the purview of the proclamation of the Governor is fully discussed and determined adversely to the contention of the appellant in *Parsons v. People,* 32 Colo. 221, 76 Pac. 666. It is true that the law of 1902 did not specifically provide that an action would lie for the collection of the annual tax and that it did provide that a corporation should forfeit its right to do business if the tax was not paid and until it was paid, with the penalties. As was said in *Parsons v. People, supra,* the object sought in passing the law was to provide revenue. If the only remedy that the state had was a forfeiture of the right to do business, the virtue of the law as a revenue producer would depend upon the grace of the taxpayer. The state would have no means to compel the payment of the money if the taxpayer did not voluntarily pay it. *Montezuma Valley W. S. Co. v. Bell,* 20 Colo. 175, 36 Pac. 1102, cited by the company, shows that in a case where

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the statute gives a specific remedy, whereby the state can get the money, as for instance by the enforcement of a lien upon property, resort must be had to the specific remedy provided. That case does not say that the only resort of the state is the specific remedy provided when that remedy is wholly inadequate to get the money if the taxpayer fails to pay it. The forfeiture of the right to do business by a corporation will not bring in revenue. A remedy providing that a tax shall be a lien upon property and providing for a foreclosure of the lien would be effective as a revenue producer. It was not the design of the legislature to put corporations out of business, but to get revenue from them. The authorities are not in accord, but it seems to us that the better way to dispose of it is to say that if the special remedy provided by the statute for the collection of taxes is not effectual to compel the payment in spite of the taxpayer's determination not to pay, then resort may be had to an action against the taxpayer; otherwise the revenue of the state would depend upon the willingness of the taxpayer to pay, and experience has demonstrated that taxes are paid with more or less reluctance.

In a note in 11 L. R. A. 818, it is said that the preponderance of the authorities is to the effect that either debt or assumpsit may be maintained for the recovery of the taxes as debt lies for a sum of money certain, due by statute. In *State v. Georgia Co.*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485 it is said that a tax "is not a debt in its most limited sense; that is, it is not liable to set-off and the other incidents of a simple contract between individuals. This is so on grounds of public policy, and also because though a debt (or due) it does not arise out of contract * * *. But it is a debt in the higher sense of the word."

If the legislature has not provided the state with an effectual remedy to collect the debt due it, it appears

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to be reasonable to say that the state may resort to the ordinary remedy provided in the case of any other corporation to whom a debt is due. In *Ryan v. Gallatan Co.*, 14 Ill. 78, it appears that the statute made provision for the collection of taxes on personal property by distress. At the end of the opinion the Court said:

"The remedy by distress is not necessarily exclusive. It is a summary proceeding, and will ordinarily be resorted to out of choice by collectors; but there may be cases where it would be ineffectual, as in this instance, where there was no personal property to distrain. As has been already shown, a legal liability existed against the assignees to pay the taxes, and an action of debt is an appropriate remedy to enforce such a liability, whenever the ordinary mode of proceeding by distress would be ineffectual."

This was followed in *Town of Geneva v. Cole,* 41 Ill. 397.

In *State v. Georgia Co., supra,* the state brought an action in the nature of a creditor's bill to recover taxes due it from a corporation. It was contended in that case that because the state had the right to have the charter of the corporation declared forfeited, because of its failure to pay its taxes, therefore the state had no right to the remedy by action. The court held that the contention was not good.

There may be many authorities opposed to those cited, and we do not wish to go in this opinion to the full length of the cited cases, for instance to the full length of what is indicated in those from Illinois. What we say is, that in a case like the present where the statute affords the state no effectual remedy to reach out and get the money, in spite of the refusal of the taxpayer, then an action will lie for its recovery.

3. It was also asserted in the demurrer that the

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complaint did not state a cause of action for the recovery of the tax claimed to be due under the law of 1907. This law specifically provides that an action of debt will lie for the recovery of the tax. But it is argued, and the argument is likewise applied to the recovery of taxes under the law of 1902, that when the company failed to pay the tax of 1903 its right to do business was forfeited and thereafter it had no such right, and the state cannot collect a tax for the use of a forfeited right. While the complaint could have been made clearer by the use of two or three more words, we are unable to reach any other conclusion than that it alleges that the company at the time it was filed, was, and for the seven years for which the tax was claimed, had been doing business. It may be that if, on and after May 1, 1903, it had not done any business and remained lifeless, it would not be liable for the tax. Such an issue, if available, must be raised by answer. The demurrer admits that it continued to exercise its right to do business during all the years mentioned and that it was still exercising that right. It cannot be heard to say that though it did business the same as before, the state cannot tax it because its right to do so had been forfeited. That would be entirely too convenient a way to pay its taxes.

4. The demurrer specially pleaded Sec. 4068 Rev. Stat. as a bar to the collection of the penalties that accrued more than a year prior to the commencement of the action. That section provides that: "All actions and suits, for any penalty or forfeiture of any penal statute brought by this state, * * * shall be commenced within one year next after the offense is committed and not after that time." In the answer brief it is insisted that this statute does not apply to the state and our attention is called to the maxim, "*nullum tempus occurrit regi.*" We need not enter into a discussion of

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that, nor of what the words "brought by the state" refer to. It is enough to say that penalties that are added to taxes as damages or interest on account of nonpayment are not such penalties as are contemplated by this section. The company's brief cites *Burlington v. The B. & M. R. R. Co.*, 41 Ia. 134 to support its contention that this limitation statute applies. That case was concerned with an entirely different statute and does not support the application of the present statute to the present case. Nor does *State v. Y. J. S. M. Co.*, 14 Nev. 220 aid us. That case merely held that an action for taxes was barred by their general statute of limitations because it specifically provided that the limitations prescribed should apply to actions brought in the name of or for the benefit of the state in the same manner as to actions by private parties, and that an action for taxes was included in the description of the actions barred by the statute.

Cases regarding penalties imposed for failure to make corporate reports have no bearing in the present case. In *L. & N. R. v. Commonwealth,* 85 Ky. 198, 3 S. W. 139, a statute authorizing judgment for triple tax and fine was said to be, but not decided, penal in its nature because the wording of the law necessarily so implied. *City, etc. v. Jones,* 20 Fed. 188, is against the contention of the company rather than in favor of it. That was an action to recover city, county and state taxes with five per cent. penalties and two per cent. a month interest on the city's and county's portion. There the statute provided that the limitations prescribed should apply to actions brought in the name of the state or for the benefit of the state in the same manner as to actions by private parties. It was said that the city and county must be treated as a part of the state. One of the clauses of the statute provided that "an action upon a liability

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created by statute, other than a penalty or forfeiture" was barred in three years. The court said:

"We think the three-years limitation of clause 1, § 338, applicable at least as to the tax,—the principal thing sued for,—and the incident doubtless follows the principal thing claimed. It is a liability created by statute, within the meaning of the Code."

This would indicate that the court thought that the penalty for the nonpayment of taxes was a liability created by statute, other than a penalty or forfeiture.

Los Angeles Co. v. Ballerino, 99 Cal. 593, 34 Pac. 329, holds that an action to recover taxes, with five per cent. thereon for delinquencies and two per cent, per month interest, is upon a liability created by statute other than a penalty or forfeiture and that the five per cent. upon the amount of the delinquent tax is not such penalty or forfeiture as falls within the provisions of the code requiring "an action upon a statute for a penalty or forfeiture shall be brought within one year," and holds that the penalty is a mere incident to the cause of action arising upon the statutory liability to pay the tax. In *Burlington v. B. & M. R. R. Co., supra,* it is said:

"Penalties, when prescribed in the case of delinquent taxes, become a part thereof, and are collected in the same manner as the taxes themselves. They are regarded in the same light as interest imposed by law on contracts, which becomes a part of the debt and is collected with it, as a part of it."

L. C. Ry. Co. v. Louisville, 67 Ky. [4 Bush.] 478, holds that the exaction of ten per cent. for nonpayment of a tax is not a penalty, but an augmentation of the tax. To the same effect is *K. P. Ry. Co. v. Amrine,* 10 Kans. 318.

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5. Another ground of demurrer was that several causes of action were improperly united in the same complaint. There seems to be some confusion in both briefs on this point. If there are seven causes of action, each for an annual tax and penalty thereon, that are not separately stated, that defect cannot be reached by demurrer. For instance a complaint in an action on several promissory notes may not separately state the causes of action. The remedy would be a motion requiring a separate statement. A demurrer that several causes of action were improperly united would not lie. If there are several causes of action alleged in the complaint as contended by the company, each is by the same plaintiff against the same defendant, for the same kind of a tax and penalty and they certainly can be united in one action, the same as causes of action upon two or more promissory notes, in which the parties are the same, may be united. It would not be necessary to bring two or more separate actions upon the notes. It is undoubtedly the practice, under our Code, to bring one action upon several promissory notes, and unite the actions separately stated in one complaint, and it is proper to so construe our code that the several causes of action sued on in this case may be united in the same complaint.

6. The contention that the complaint did not allege enough to show that the state could recover the statutory penalties, under the law of 1902, may be considered in connection with the assignment that the judgment was excessive. The part of Sec. 68 of the Act of 1902 that is applicable here reads as follows:

"It shall be the duty of the state auditor within thirty days after the first day of every May, to notify in writing all such corporations as have forfeited their charters or their rights to do business within the state of Colorado, under the provisions of the foregoing sec-

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tions, and any such corporation which shall, at any time after such notice pay to the auditor the tax payable on or before the first day of May of that year and ten per cent. of said tax in addition thereto, for every six months or fractional part of six months, from the date of said notice, shall thereupon be relieved from the forfeiture of its charter or right to do business within the said state, by reason of such failure."

It appears from this that the penalties were to be computed from the date of the notice given after the tax became due. Nowhere in the complaint is it alleged that any such notice was given. The allegation in the complaint concerning notice may be vague, but it can only refer to the notice required by Sec. 67. There is no basis afforded in the complaint for the computation of penalties on the taxes due under the act of 1902. There is no such provision concerning notice in the act of 1907. We think that the complaint is not sufficient to support a judgment for penalties on the annual taxes which may be due under the law of 1902, and for that reason, the judgment will have to be reversed.

We have decided only questions that were raised. If there is any other constitutional or other objection to the tax, that objection has not been determined or precluded by this opinion.

The judgment is reversed and the cause remanded for further proceedings with leave to the plaintiff to amend the complaint as may be advised and as the law permits.

Reversed and remanded.

Decision *en banc.*

Mr. JUSTICE HILL not participating.

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[No. 8057.]

TASHIMA v. THE PEOPLE.

1. APPEAL AND ERROR—*Harmless Error.* A party will not be heard to complain of the refusal of an instruction, in lieu of which one more favorable to him was given. (102)

The withdrawal from the jury of one count of an information, is harmless. (104)

2. ——*Verdict on Conflicting Evidence*, controls in the Court of Review. (103)

3. BILL OF EXCEPTIONS—*When Necessary.* Error assigned upon an instruction to which no exception appears in the record will not be considered. *Semble.* An exception to this rule may be made to avoid a miscarriage of justice. (102)

4. ——*Requisites of.* Complaint of improper remarks in the argument of counsel will not be considered where it is impossible to determine from the bill of exceptions what the exact language was, or the connection in which it was used. (102)

5. BAILMENT—*Defined.* Bailment is the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it.

Delivery of a certificate of deposit, by payee to another, merely that the person receiving it shall cause it to be renewed, *held* a bailment within Rev. Stat. Sec. 1688.* (104)

Error to Denver District Court.—Hon. CHARLES C. BUTLER, Judge.

Mr. JOHN HORNE CHILES, for plaintiff in error.

Hon. FRED FARRAR, Attorney General, Mr. FRANK C. WEST, Assistant Attorney General, for The People.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

Complaining witness, Yanari, was a patron of de-

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fendant's boarding house. He testified that in December, 1911, or January, 1912, he was the owner of and had in his possession, a certificate of deposit, about to mature, issued to him by a San Francisco bank; that on account of his going away with a railroad gang to work, he was unable to attend to its renewal, and endorsed it and delivered it to the defendant with instructions to forward it to the bank for renewal; that defendant accepted the certificate for this purpose, and Yanari never saw it again, or received the renewal or the proceeds; that although he made repeated attempts, he was unable thereafter, before the commencement of the criminal action, to see defendant.

Defendant admitted that he received the certificate, deposited it to his credit in a bank, and used the proceeds in his business; but claims he borrowed the money; that Yanari in compliance with his request for a loan, gave him the certificate and in addition one hundred dollars in cash, for which he made, executed and delivered his promissory note to Yanari, which defendant produced on the trial, a translation of which is as follows:

"Memo.

Dec. 20, 1911.

$300.00

Remarks.

$200.00 Specie Bank certificate, Y402.01.

$100.00 Amount left on hand of Mrs. T. Horikuwa.

Term—April 20, 1912.

The above amount surely borrowed.

Signed by C. K. TASHIMA

S. HIRO.

To Mr. K. YANARI."

When this note became due, defendant, according to his testimony being unable to pay it, gave Yanari a new note for $209.00 the balance due, $100.00 of the amount,

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as he claimed, having been paid. This purported renewal note was introduced by the people, its substance being incorporated in the record as follows:

"Date, April 20, 1912. Signed by S. Hiro and K. Tashima, certificate of deposit $209. I received the same for safe custody for K. Yanari, and this is payable whenever after September of this year."

Yanari denied that he loaned the money represented by the certificate, or any money to the defendant, and testified that he never saw the first note nor heard of its existence until it was produced at the trial; that the certificate was delivered to defendant for the specific purpose of having it renewed, and that only. As to the renewal note, he said defendant's partner Hiro brought it to him and requested him to accept it; but he declined to take it, whereupon Hiro forced it upon him by sticking it in the outside pocket of his coat and leaving him.

The jury found the defendant guilty of larceny as bailee and from the judgment of the court based upon the verdict, he brings the case here for review.

The errors which are relied upon by plaintiff in error for a reversal and which are discussed in the briefs, are as follows:

1. That the court refused to submit to the jury under proper instructions the theory of the defense that Tashima used the certificate of deposit under a claim of right.

2. That the court erred in giving an instruction as to the effect of the promissory note given after the conversion of the certificate.

3. Improper remarks of the district attorney in addressing the jury.

4. That the verdict is not sustained by the evidence.

5. That the verdict is contrary to law.

6. That the court erred in not submitting to the jury under proper instructions the question of whether

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defendant was guilty, if at all, of common law larceny, or larceny as bailee. We will discuss these questions in this numerical order.

1. Defendant complains that the court refused an instruction upon his theory of the case, that the certificate was converted to his own use under a claim of right, without felonious intent. Upon this proposition defendant requested the court to give the following instruction:

"The jury are further instructed that if the accused believed that he had a right to put the property in question to his own use, and if the jury find that it was the understanding between the accused and the said K. Yanari that a mere debtor and creditor relationship should exist between them, and if the jury find that the said K. Yanari took the note of the accused in return for the said time certificate, then the jury should acquit the defendant."

The court refused to give this instruction, and gave the following:

"VII.

"That to constitute the crime of larceny a felonious intention, that is an intention to steal, must always exist. And, under our statute, making the conversion of property to his own use by a bailee larceny, the crime is not made out by merely showing a conversion of the property to his own use by the bailee, but it must further appear that such conversion was with an intent to steal the same. The jury are instructed, that the taking or conversion of personal property which renders a person guilty of simple larceny, or of embezzlement, is a felonious taking or conversion, and before you can convict the defendant in this case you must be satisfied, from the evidence, beyond a reasonable doubt, that the property mentioned in the information, or some part of it, was

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converted to his own use by the defendant, with an intention, at the time, to steal the same."

While it might have been well for the court to have given an instruction based upon the defense presented, still we believe that the question was sufficiently covered by the instruction given, which was more favorable to the defendant than the one refused. Had the jury believed the defendant's version of the transaction, that the money was borrowed upon an agreement between the parties, under the instruction given, they could not have found any intent to steal and undoubtedly would have acquitted the defendant. No other reasonable conclusion can be reached.

2. This assignment relates to one of the instructions given by the court. The record contains no objection or exception covering this proposition and under the well established rule of this court, we must decline to consider it. We do not say that we would not make an exception to the rule in a case where its enforcement would uphold a flagrant violation of the rules of law or a miscarriage of justice; but this is not such a case.

3. As to the remark of the district attorney in his argument to the jury, that the defendant was "guilty as hell," there is nothing in the bill of exceptions relating to this matter from which we can determine what the exact language was or in what connection it was used. There was no objection made to it at the time, and no exception saved. We are in no position to pass intelligently on the question and must refuse to consider it.

4. Plaintiff in error contends that the judgment is not sustained by the evidence. The testimony in the case is not entirely satisfactory. The witnesses for the most part were foreigners, unable to speak or understand our language, and their evidence was given through an interpreter who did not at all times succeed

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in making the answers clear. On a careful examination of the whole record, however, we are unable to say that there is not sufficient evidence to sustain the verdict. It is undisputed that the certificate of deposit was left with the defendant and that he used it in his business. The only question was, whether the money it represented was loaned to him or whether he received it for the purpose of renewal only, and feloniously converted its proceeds to his own use. This was a question for the jury which resolved it against the defendant on conflicting evidence, and with its finding we cannot interfere.

5. Is the verdict contrary to law?

Plaintiff in error says that if he is guilty of anything, it is embezzlement and not of the crime of larceny as bailee. The two crimes are very similar in their nature. Our statute provides: "If any bailee, by finding or otherwise of any money, bank bill, or note, or goods or chattels, shall convert the same to his or her own use with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious, and on conviction thereof shall be punished accordingly." R. S. 1908, § 1688. A construction of this statute necessarily involves the definition of the term bailment, and the determination of who is a bailee. The authorities are by no means harmonious upon the proposition. One line, upon which plaintiff in error relies, supporting the definition that a bailment includes contracts where the specific property is to be redelivered to the bailor; and the other defining the term as a delivery of a thing in trust for some specific object or purpose, and upon a contract express or implied to conform to the object or purpose of the trust. Without entering into a discussion of the many arguments for or against either of these varying views, it may be observed that the word bailment comes from the

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French "Bailler," meaning to deliver; and in its ordinary signification which conforms to modern authorities, and is substantially correct, may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished.—3 R. C. L. 72; *Carley v. Offut,* 136 Ky. 212, 124 S. W. 280, 26 L. R. A. (N. S.) 1114, 136 Am. St. 214.

We are of the opinion that in the case at bar, the transaction as testified to by the complaining witness was a bailment; that the defendant was a bailee, and that the wrongful conversion of the property by him, is covered by our statute on that subject.

6. In this assignment the defendant complains because the court withdrew from the consideration of the jury the third count of the information charging him with common law larceny, contending that it should have been left to the jury to say what, if any crime, he had committed. We are unable to see how the action of the court in this regard prejudiced the rights of plaintiff in error in any way. We should rather consider it an advantage to him, than otherwise, and must overrule this assignment.

Upon a careful consideration of the whole record, we cannot say that it contains any prejudicial error, and the judgment will therefore be affirmed.

Affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

* Syllabus by GARRIGUES, J.

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[No. 8419.]

THE ELECTION COMMISSION OF THE CITY AND COUNTY OF DENVER v. THE PEOPLE EX REL. LEE.

1. ELECTIONS—*Political Party—Statute Construed.* In common use the phrase "political party" is synonomous with political organization; but the legislature by c. 4 of the laws of 1910 make a marked distinction between them. An association of electors, who, by petition, place upon the official ballot, individual nominees for public office are a "political organization," even though this is not their intention. To become a political party it must participate in the election, and its candidate for governor must receive at least 10 per cent of the total vote cast at such election. (108, 109)

A political party cannot nominate by petition, nor can a political organization, so nominating, adopt any portion of the name of a political party then existing. (109)

2. ——*How the Percent of the Vote is to be Ascertained.* Distinct political organizations, under different names, presented the same gentleman as their candidate for governor. One of these was denominated the Progressive Party. On application to the Election Commission of Denver by those claiming this title, to accept and use in the appointment of judges and registrars, at the next succeeding election, certain electors nominated by them; *held* that the votes cast by all these several organizations for the same candidate, were not to be considered as cast by the Progressive Party. The right of the relator it was said is not conditioned upon the number of votes which its candidate received, but upon the number which his organization cast. (110)

And evidence that the several different organizations, so voting for the same person, were but one organization, under different names, was held inadmissible. (111, 112)

A political organization is, under the statute, a distinct entity which can neither coalesce with another, nor lose its identity therein by the mere fact that its candidates, principles, and management are the same. (111)

Error to Denver District Court.—Hon. GEORGE W. ALLEN, Judge.

Mr. FRANCIS J. KNAUSS, Mr. W. W. GARWOOD, for plaintiffs in error.

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Mr. C. M. DEARDORFF, Mr. P. W. MOTHERSILL, for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

The People, upon the relation of A. A. Lee, as Chairman of the County Central Committee of the Progressive Party of the City and County of Denver, brought an action in the District Court to compel the Election Commission of such territorial district to accept and use in the appointment of judges and registrars of election therein, for the two year period beginning on the first Tuesday of July, 1914, the list of names of certain qualified electors claimed to have been certified to the proper officers by such organization under the provisions of chapter 127, S. L. 1911. Judgment was in favor of the plaintiff, and the defendant Election Commission brings the cause here for review upon writ of error.

The record discloses that at the primary election in 1912 the Democratic Party selected as its candidate for Governor, E. M. Ammons, and in the general election following he received 25,066 votes in the City and County of Denver, and in the entire state 114,044; that the Republican Party at such primary selected as its candidate for Governor, C. C. Parks, who received at the general election following 7,909 votes in the City and County of Denver, and 63,061, in the entire state. The Democratic and Republican Parties were the only organizations participating in the primary election, and Ammons and Parks were the only candidates for the gubernatorial office nominated by such direct primary election under the provisions of Chapter 4, S. L. 1910. At the general election, however, there were other candidates for such office, who had been placed in nomination

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therefor by petition of qualified electors under the provisions of the last named act. One body of qualified electors, so making nominations, styled itself the Progressive Party and filed its certificate of nominations of candidates at 9:03 A. M., September 6, 1912, in which it named Edward P. Costigan for Governor. Another body of such qualified electors, styled itself the Roosevelt Party and, on the same day at 9:05 A. M., filed its certificate of nominations, also nominating Edward P. Costigan as its candidate for Governor. And on the 11th day of September, 1912, another body of such qualified electors, under the name of the Bull Moose Party, likewise filed a certificate of nominations wherein Mr. Costigan was also named as its candidate for Governor. The vote which Mr. Costigan received at the general election on either of these tickets is not disclosed, though it is shown that he received 23,278 votes in the City and County of Denver, and in the entire state 66,132.

By the provisions of § 3 of Chap. 127, *supra,* the respective county chairmen of the two political parties in each county "having cast the highest number of votes for Governor at the last general election for state officers" are required, between the first day of May and the third Tuesday in June, 1914, to certify to a designated county officer the names of not less than three nor more than six qualified electors in each of the precincts; and, in conjunction with certain provisions of the charter of the City and County of Denver, the Election Commission is required to appoint from such list, when so certified, the registrars and judges of election. Therefore, the sole questions here involved are: (1) Was the organization—the Progressive Party—of which relator claims to be chairman a "political party" within the meaning of the election laws of this state at the general election in 1912; (2) At the time the registrars and judges of elec-

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tion in question were to be appointed, was the Progressive Party, within the meaning of the election laws, a "political party" "having cast" the highest or second highest "number of votes for governor" at the general election in 1912?

(1) We are of the opinion that at the general election in that year the association of electors known as the Progressive Party was not a "political party" within the meaning of the election laws, but was a "political organization" only, and, as such, cast its vote at that election. We can reach no other conclusion under the express language of chapter 4, S. L. 1910, which defines "political parties" and "political organizations," making a marked distinction between the two. While, ordinarily, the phrases are synonymous the legislature has not so used them. This is manifest throughout the entire act. Section 1 expressly declares, *inter alia,* "that all political parties shall make all nominations for candidates * * * by direct primary elections." Section 10 provides, that "each political party entitled to participate in any direct primary election shall have a separate party ticket," while § 24 declares, substantially, that except in the case of vacancies, no nominations of candidates of any political party which is required to make nominations under the act, shall be placed upon the official election ballot unless such candidates shall have been chosen in accordance with the act. Moreover, by § 21 central committees of parties existing at the time the act became a law were recognized and continued until direct primary elections should be held under the provisions of the act at which, and thereafter at each succeeding primary election, political parties were and are required to elect a resident committeeman and committeewoman from each election precinct who are constituted the rep-

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resentatives, and central committee, of their respective political parties. And by § 22 the candidates for state offices and representatives for congress nominated by each political party at each direct primary election, together with the state chairman and state senators of such political party whose term of office extends beyond the second Tuesday in January of the year next ensuing, shall meet at a designated time and place and formulate the state platform of their respective parties. On the other hand, a "political organization" must select its candidates by petition of qualified electors as prescribed in the act; and there is no provision made for the selection of precinct officers, central committees or chairmen of such organizations; nor are its candidates required to formulate and publish a platform. Moreover, § 2 expressly provides how a "political organization" may, and when it shall, become a "political party." Therein it is declared that any "political organization" which, at the general election last preceding any primary election provided for in the act, was represented on the official ballot by either regular party candidates or by individual nominees only, may upon complying with the provisions of the act, have a separate primary election ticket as a political party, *if its candidate for governor received ten per cent. of the total vote cast at such last* preceding general election; and any such political organization shall be a "political party" within the meaning of the term as used in the act. Thus it clearly appears that an association of qualified electors who, by petition, place upon the official ballot individual nominees for public office, constitute and are a "political organization;" that as a condition precedent for such "political organization" to become and be a "political party" within the meaning of the act, it shall participate in such election, and, in addition thereto, cast for its candidate

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for governor at least ten per cent. of the total vote cast at such election. When these things occur the "political organization" becomes a "political party."

(2) It may be, though we shall not now determine, that a "political party," having become such at a general election and cast thereat the highest or next highest number of votes for governor, is, subsequent thereto and prior to the following general election, one of the two political parties having cast the highest number of votes for governor at the last general election, and, therefore, entitled to participate, under the provisions of the act, in the selection of election registrars and judges. But, be that as it may, it is clear that the record before us fails to show that the Progressive Party comes within that class. The fact that its candidates at the only state election in which it has participated were placed upon the official election ballot by petition and not by nomination at a primary, fixed its status as an organization which is presumed to continue until some other status is established by proper proof. The claim is that this was accomplished by showing the total votes Mr. Costigan received. This might, *prima facie*, be sufficient, were it not for the fact that the record shows that he was also the candidate of two other organizations for the same office at the same election. Clearly no presumption can arise, even *prima facie*, under such facts that the Progressive Party cast all the votes Mr. Costigan received thereat, or any particular number thereof. To indulge that presumption would be as improper as to assume that all such votes were cast by either or both of the other "political organizations" whose candidate he was. The right claimed by the relator herein is not, under the statute, conditioned upon the number of votes which its candidate for governor received, but upon the number of votes which his organization cast for governor. If a

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person be the candidate solely of one "political party" or a single "political organization," the votes which he receives at a given election are conclusively presumed to have been cast by the particular party or organization whose candidate he is; but if he be the candidate of two or more "political parties" or "political organizations" no such presumption can exist. However, it is asserted and evidence was offered to show, that the "Progressive Party," the "Bull Moose Party" and the "Roosevelt Party" were but different names for one and the same "political organization," the principles and management of which were identical and whose candidates were the same. Were it not that the statute, as hereinbefore pointed out, makes a marked distinction between "political parties" and "political organizations," investing the latter with the power to become the former, such evidence might be admissible and, perhaps, control the question involved. But, as the law is, the selection of a name and the filing thereunder of a list of nominees by the requisite number of electors, creates a distinct entity, to-wit; a "political organization," which can neither coalesce with some other such entity nor lose its identity therein by the mere fact that its candidates, its alleged principles and its management are the same. This entity may, however, and does, upon certain conditions, become a different entity, towit; a "political party." Indeed, it would seem that one clear purpose of the statute is to protect the names selected and thus preserve party integrity. Electors nominating candidates by petition are required to select a name to designate their organization and are prohibited from using the name, or any part, thereof, of any political party as defined in the act Moreover, they are required to make oath, *inter alia,* that they have not voted at any primary election to nominate candidates for such offices, and no certificate

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of nomination is legal that does not contain the requisite number of names of voters whose names do not appear on any certificate of nomination previously filed. § 26, Chap. 4, S. L. 1910. Clearly these several political organizations cannot be held to be synonymous under the laws of this state. We have already so held in *Wiley v. McDowell,* 55 Colo. 236, 239, 133 Pac. 758, in the following language:

"It was alleged and sought to be shown, that the Progressive, Bull Moose and Roosevelt tickets were the same and represented the same party, and that the candidates on each of said tickets for state officers were the same persons, and a vote cast for anyone was a vote for the same party as either of the others; that the words, 'Progressive,' 'Bull Moose' and 'Roosevelt' each meant, and were understood by the voters to mean, the same party; that while in Gunnison county the Progressive was the only one which filed a separate and distinct petition endorsing the Republican county ticket and candidates, thereby placing in nomination as their candidates the same as those already upon the Republican ticket, that it was the same in fact as if separate petitions had been secured and filed representing each of said names, for which reason that the electors who wrote either the word 'Roosevelt' or 'Bull Moose' in the space in the ballot to be filled out in order to vote a straight ticket, intended thereby to vote for the county candidates on the Republican and Progressive tickets and did so vote. We cannot accept this conclusion."

If, as claimed by plaintiff, there was no actual intent or purpose on the part of the two groups of qualified electors preparing, signing and filing respectively the "Bull Moose" and "Roosevelt" certificates of nomination, of forming a "political organization" separate and distinct from the "Progressive Party," there was, never-

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theless, within the purview of the law, such intent which controlled their action in the premises. They did exactly what the statute says they may and must do to create "political organizations," which may and do, upon certain conditions, become "political parties" each separate and distinct from the other. Under each respective designation the voters thereof acquired certain political rights and benefits, separate and distinct from those acquired by the electors voting under some other political or party designation. The record shows that the vote Mr. Costigan received was cast by three political organizations which, in law, are conclusively presumed to be separate and distinct and each of which might have, by that very election, become a distinct political party, but it does not disclose the number of votes cast for him by either of such organizations and, therefore, fails to show that the relator is the county chairman of either of the "two political parties having cast the highest number of votes for governor at the last general election." It was incumbent upon relator to show this fact and, having failed in that regard, no court should interfere with the judgment of the Election Commission in the premises.

Attorney General v. McOsker, 198 Mass. 344, 84 N. E. 473, relied upon by relator is not in point under the law and facts here involved. Under the statute in that case no distinction appears to exist between a "political party" and a "political organization," and, therefore, the general definition, that a "political party" is a voluntary association of voters desirous of promoting a common political end or carrying out a certain line of public policy, maintains. Moreover, the statute there permits the name of a "political party" to be used in conjunction with some other name in the designation of candidates nominated by petition requiring the words "nomination paper" to be added on the official ballot following

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such political designation which, the opinion holds, page 473, "is for the purpose of showing which candidates, belonging to the party, are regularly nominated and which are nominated by individuals * * * and implies that when the same person is the nominee in both forms, all the votes cast for him may be treated as belonging to the same party." Under the statute in the case at bar a "political organization," as we have heretofore seen, is not synonymous with a "political party" and the meaning of the two phrases is circumscribed and limited; and electors nominating candidates by petition are expressly prohibited from using a party name or any part thereof in the designation of candidates.

Further, the Attorney General-McOsker case grew out of a contest by two factions of the same party for the use of the party name wherein each faction, while awaiting the determination of the question as to the right to the use of the name, filed its list of nominees, by petition, upon the last day that nominations could be so made. One faction used the regular party name "Democratic" in conjunction with the word "Citizens'" to designate its list of candidates, which were the same, except in one instance where the candidate had withdrawn, as its convention nominees, while the other used the words "Independent Citizen," and its candidate for governor was the same as that of the other faction. The tribunal before which the controversy was pending finally decided that the convention certificate of nominations presented by the faction that subsequently filed its list of nominees by petition under the designation "Democratic Citizens'" was the act of the Democratic Party, and the names of the candidates therein set forth should go upon the official ballot under such party designation. It was then too late to withdraw the list of nominees by peti-

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tion made by this faction under the designation "Democratic Citizens.'" While it was held therein that in determining the highest number of votes for governor cast by the Democratic Party, the number cast under the designation "Democratic Citizens'" should be included, it was, nevertheless, pointed out that those cast for the same candidate under the designation "Independent Citizen," and those cast for him under no designation, should not be included. In other words, under the statute there involved, there being no distinction between a "political organization" and a "political party," the latter may nominate candidates for public office either by convention or petition, subject only, under the last named plan, to the use of some other word in conjunction with the party name, while nominations, by petition without the use of party names, indicate an intention to create a new party, and the votes cast thereunder for a candidate may not be included in ascertaining the number of votes cast for such person by some other party under its party designation. Under our statute, as we have seen, a "political party" cannot nominate by petition, nor can an organization, so nominating, use any portion of a party name, and the filing by petition of a certificate of nominations by the latter is necessarily the initiatory act in the formation of a new party.

We are of the opinion that the judgment of the trial court coercing the Commission was wrong under the state of facts shown by this record. It is, therefore, set aside and the cause remanded with directions to dismiss the same.

Judgment reversed and remanded.

Decision *en banc*.

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Mr. JUSTICE HILL not participating.

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT dissent.

[No. 7112.]

THE OHIO AND COLORADO SMELTING AND REFINING COMPANY V. BARR.

1. EJECTMENT—*Title.* The legal title prevails where no issue of equitable cognizance is tendered. (122)

2. TRUSTS—*Statute of Uses—Operation.* The statute of uses has no effect upon implied, resulting, or constructive trusts, but solely upon dry, naked or passive trusts created by the parties, and disclosed by the terms of the conveyance. It has no application to a conveyance which transfers land to parties designated as trustees, but in which the trust is not defined, nor the beneficiary named. (122)

Teller v. Hill 18 Col. App. 509, distinguished. (123, 124)

And the statute has not the effect to vest title in one having a contingent interest, dependent upon a condition never performed. (129)

3. EXECUTION—*What Interest in Lands Liable.* Any interest in lands, legal or equitable, may be sold upon execution (Rev. Stat. sec. 3609). (131)

No rule of law or morals prevents the creditor from levying his execution upon any lands in which he even suspects the debtor to have an interest, and proceeding to the sale thereof. (131, 132)

The creditor may levy upon and sell lands where another claims an interest, in which he himself already has an interest, or even the whole title. (132)

4. ——*What the Purchaser Acquires—Duty of Purchaser.* One contemplating the purchase of lands upon execution sale is under duty to make diligent inquiry as to the title of the execution defendant.

The maxim *caveat emptor* applies; the purchaser takes whatever interest in the lands the debtor has, and only that interest. (132)

5. ——*Effect of Levy as to Creditor.* The levy of an execution

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upon lands is not a warranty nor even a declaration that the defendant in execution has title to the lands or any interest therein. (133)

6. ESTOPPEL—*By Conduct.* One who having title to lands, causes the same to be sold on execution as the property of another, who claims an interest therein, and becomes the purchaser at the sale is not, merely by such conduct, not having made any representation or done any act to influence other creditors, estopped to assert his title as against another judgment creditor, who redeems from such sale, causes the lands to be sold on his execution, pursuant to such redemption, and procures the conveyance of the sheriff; and this even though he receives and retains the redemption money. (133)

7. EQUITY—*Jurisdiction.* It seems that where lands are conveyed to one as trustee, the conveyance not defining the trust, or naming the beneficiary, a court of equity may by its decree supply the defects of the conveyance. (129)

8. EVIDENCE—*Parol Admissible,* in an equity suit to establish and define the trust, and identify the beneficiary, in a conveyance of lands to one named as trustee merely. (129)

Appeal from Saguache District Court.—Hon. CHAS. C. HOLBROOK, Judge.

MESSRS. YEAMAN & GOVE, Mr. PRESTON H. BARKER, for appellant.

Mr. EDWARD C. STIMSON, Mr. JAMES J. SULLIVAN, Mr. PAGE M. BRERETON, for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court.

This action is by the Ohio and Colorado Smelting and Refining Company, appellant here, for possession of the Bonanza lode mining claim, against E. C. Barr, appellee here. Trial was to the court with judgment for Barr, and appellant brings the case here for review.

September 20, 1888, patent issued to the Bonanza Mining Company for the Bonanza lode, in Kerber Mining District, Saguache County, Colorado. On May 2,

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1902, the Bonanza Mining Company executed a deed for the claim to P. J. Larrabee, E. F. Crooks and E. C. Barr, trustees which was filed for record in the proper office May 29, 1903.

December 19, 1903, in an action previously commenced in the District Court of the City and County of Denver, Barr recovered judgment against the Hanover Mining and Milling Company for $2,605 and costs. Upon this judgment execution issued to the Sheriff of Saguache County, and levy was made on the Bonanza lode as the property of that company. The property was sold pursuant to such levy and purchased by Barr.

On January 11, 1904, appellant obtained judgment in the County Court of Chaffee County, Colorado, against the Hanover Mining and Milling Company for $661.16 and costs, and execution thereon was issued to the Sheriff of Saguache County and levy was made upon the Bonanza lode as the property of that company. September 30, 1904, the property was sold under such execution and purchased by appellant for the sum of $3,644.35, a portion of this sum being the amount of the judgment obtained by the defendant Barr against the Hanover Company, together with interest and costs which was paid to appellee through the Sheriff of Saguache County in redemption of the property from the Barr sale. The amount so paid to redeem was received by the attorney of Barr, and by him remitted to, received and retained by the latter.

There was no redemption from the sale under execution in favor of appellant, and on December 1, 1904, the Sheriff of Saguache County executed it a deed for the Bonanza claim, which was recorded the same day.

The complaint in this case was filed July 26, 1907, in the District Court of Saguache County, the substantial averments of which are that appellant is the owner in

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fee of the mining claim in question, and except as wrongfully deprived thereof by the appellee, was entitled to and was in peaceable possession; that on August 22, 1906, while appellant was the owner and in possession, the appellee, without right or title, entered upon and ejected appellant, with prayer for possession and damages. On March 11, 1909, the appellee answered, denying the allegations of the complaint, and alleged that on September 20, 1888, the Bonanza Mining Company was the owner and in possession of the premises in question, had obtained patent therefor from the United States, and that it thereafter conveyed the same to the defendant in fee-simple title; and that by virtue of said conveyance, and from the date thereof, appellee had been in peaceable possession and control; that he had never been divested of his title, and that appellant never had any right, title or interest in the property. Thereafter appellant filed its replication, putting in issue all affirmative allegations of the answer, with a pretended plea of estoppel, to the effect that Barr had obtained a judgment against the Hanover Mining and Milling Company, and had the property sold under execution as the property of that company, at which sale Barr had purchased the property, and from which sale the appellant had redeemed, as hereinbefore set out, and the acceptance and retention by Barr of the amount so paid by appellant upon such redemption.

At the trial of tht case there was produced a certified copy of the deed from the Bonanza Mining Company to Larrabee, Crooks and Barr, trustees, the portions of which, material for consideration, are as follows:

"Know all men by these presents, that the Bonanza Mining Company, a corporation organized and existing under the laws of the State of Ohio, for and in consideration of the sum of twelve thousand dollars to it paid by

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P. J. Larrabee, of Portland, Maine, E. F. Crooks, of Northampton, Massachusetts, and E. C. Barr, of Springfield, Massachusetts, trustees, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey to the said P. J. Larrabee, E. F. Crooks and E. C. Barr, trustees, and their heirs, successors and assigns forever, all its right, title and interest in that certain mining claim or premises known as the Bonanza lode mining claim. * * * To have and to hold said mining premises, together with all the right, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantees, their successors, heirs and assigns forever."

It should be noted that in this deed Larrabee, Crooks and Barr are named as trustees simply. The trust created by the deed, if any, is not defined; no powers of the trustees are enumerated and no beneficiary is named. The uncontradicted testimony of Barr and Crooks, which was permitted in evidence without objection, and indeed a portion of it was introduced by the appellant itself, shows that the property was conveyed to the trustees for the benefit of the Hanover Mining and Milling Company, only upon condition that that company pay at maturity certain of its promissory notes, indorsed by Barr as surety, upon which was procured the purchase price of the property, aggregating $12,000, in which event the legal title was to be conveyed to that company; but should it fail to so pay the notes, and Barr should pay them, then the property was to be the property of Barr, and he should have conveyances from his co-trustees. The testimony further shows that the Hanover Company did not pay the notes, or any part of them, but that Barr did, and that at no time has the Hanover Company reimbursed Barr in any sum whatsoever on account of such payments. Appellant intro-

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duced in evidence the deed to it from the Sheriff of Saguache County, for the property, containing the usual recitals as to entry of judgment, levy and sale under execution, and purchase by appellant.

Other evidence received was to the effect that on April 7, 1903, the Hanover Mining and Milling Company, through its officers and directors, endeavored to negotiate a sale of the Bonanza mining claim, and directed a conveyance by the trustees of the claim to one H. C. Donnell, a proposed purchaser of the property. These negotiations were approved and concurred in by the stockholders of the company, including Barr and his co-trustees.

Barr offered in evidence certified copies of two deeds from his co-trustees, Larrabee and Crooks, purporting to convey their interests in the Bonanza lode. To the introduction of this testimony the appellant objected, and upon its objection being overruled, reserved exceptions. These deeds were dated, respectively, August 9, 1907, and January 28, 1908, and recorded February 7th of that year. Each contained a recital in effect as follows: That on or about May 2, 1902, the Hanover Mining and Milling Company executed its promissory notes for the sum of $12,000; that these notes were indorsed by Edwin C. Barr (the defendant in this case) and discounted; that the proceeds were used by the Hanover Mining and Milling Company to purchase the Bonanza lode from the Bonanza Mining Company; that title to the claim was vested in Larrabee, Crooks and Barr, as trustees, upon the understanding that if the notes were paid at maturity by the Hanover Mining and Milling Company the property should be conveyed to that company by such trustees, but in case of default in payment of the notes, and that the said Barr, as endorser, should pay the same, then the property should be conveyed to

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Barr by his co-trustees; that the Hanover Mining and Milling Company had defaulted in payment of such notes, and that Barr, as endorser, had paid the same together with interest and costs; that since such default the last named company has refused to pay the amount of such notes to Barr, or to save him harmless by reason of his endorsement, whereupon it had become the duty of the trustees to convey to him all the right, title and interest in the property acquired by them as such trustees.

The action being for possession, with no issue tendered of equitable cognizance, the naked legal title must control, and unless the appellant has shown that such title passed in fact to the Hanover Company, and from that company to it through the execution sales, the judgment below was right and should be affirmed.

The main contention is that the property in controversy was conveyed to Barr and his co-trustees for the use and benefit of the Hanover Mining and Milling Company, and that by operation of the statute of uses, which has been declared to be in force in this state, *Teller v. Hill,* 18 Colo. App. 509, 72 Pac. 811, the legal and equitable titles were merged, upon the execution and delivery of the conveyance under consideration, in that company.

The statute of uses was enacted to remedy the evils arising from a separation of the legal and equitable estates in land, which at common law resulted whenever a trust or use was created, the object and purpose being to unite both estates in the beneficiary and to divest the trustees of all title or interest. Without diversity of opinion the statute, however, is held to operate only in cases, where the trust is a dry, naked, passive one. The statute does not operate upon implied, resulting or constructive trusts, but solely upon express trusts created

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by the parties and disclosed by the terms of the conveyance itself. It acts upon the conveyance direct, and not upon unascertained matters outside of it. This seems axiomatic and needs neither authority nor argument to support it. If the title is passed automatically by operation of the statute upon the conveyance which creates the trust or use, then, in the very nature of things, such instrument must designate some beneficiary or usee to whom title may pass, otherwise there is nothing upon which the statute can operate automatically. If under a conveyance in which the beneficiary or usee is not named, but is absolutely unknown and unascertained, the statute can be said to take the legal title out of the trustee, the effect could only be to suspend it in the air, and no such absurd result could ever have been in contemplation. The fact is that the instrument itself creates no express trust in favor of the Hanover Company. That company is not mentioned in the conveyance, either directly or otherwise, and so far as the instrument discloses, it may in fact have had no legal existence. If a trust or use was created by this conveyance in favor of the Hanover Company, it rests upon evidentiary matters wholly outside the deed, and can only be ascertained, declared and made operative in a suit in equity. The fact that such a suit is necessary to have the instrument construed, its effect declared and the trust administered, in and of itself alone, is a demonstration that the statute does not and cannot operate upon it.

The decision in the case of *Teller v. Hill, supra,* is mainly relied upon to support the contention that the statute of uses operates upon the conveyance in question. The deed in that case is entirely different in essential particulars from the one now under consideration. In that case the recitals in the deed were properly and correctly construed by the court as a part of the in-

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strument, the consideration being expressed as moving from the *cestui que use,* Pell and Seymour, not from Willard Teller, the grantee, and the names of the *cestui que use* are disclosed in the deed, while in the case at bar the deed not only recites that the consideration was paid by the grantees, denominated trustees, but fails utterly to indicate for whose use or benefit the trust, if any, was created. It is impossible to determine from a consideration of the conveyance itself who, if anyone, is the *cestui que use,* or indeed whether there is any *cestui que use* at all, from which it is obvious that the contention that the statute of uses operates upon it cannot logically be maintained. If a trust or use was created at all in favor of the Hanover Company, it is one which rests in parol and can only be ascertained by resort to equity. Thus a vitally different situation from that found in the Teller-Hill case is presented. There the trust is completely expressed in the conveyance. Indeed, the main reliance in that case for affirmance of the judgment, which declared that the statute operated to merge the two titles, was the fact that the trust is fully set forth in the deed itself, with all parties in interest designated and their relations disclosed by its affirmative recitals. No principle is more firmly established than that uses or confidences resting in parol are not executed by the statute of uses, except where the transfer itself might have been by parol. As a practical matter this must be so. Where the conveyance fails to disclose in whom the equitable title is vested, how can the statute, by its own force, be held to point out and declare the beneficiary actually intended, and vest the legal title accordingly? Because of these essential differences between the conveyance considered in the case of *Teller v. Hill, supra,* and the one now before us, it is manifest that the decision in the former case is not only not controlling here, but can have no possible application.

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In support of the various legal propositions announced above, we cite the following authorities: *Strimpfler v. Roberts,* 18 Pa. St. 283, 57 Am. Dec. 606; *Trask v. Green,* 9 Mich. 358; *Little v. Lesia,* 5 Mich. 118; *United Brethren Church v. First M. E. Church,* 138 Ill. 608, 28 N. E. 829; *Auten v. City Electric Street Railway Co.,* (C. C.) 104 Fed. 395; Tiedman on Real Property (3rd Ed.) § 346; 2 Washburn on Real Property (6th Ed.) § 1356; and 39 Cyc. pp. 203, 206 note 13, 223 note 83.

In the case of *Auten v. City Electric Railway Co., supra,* certain deeds were to be considered and construed, in which the grantees were named as Allis, Bradford and Johnson, trustees, but none of the deeds, specified for whom the grantees were trustees, nor were the objects of the trust stated. It was, however, conceded by all the parties to the suit that these men were trustees for the defendant company. It was urged that the statute of uses, admittedly in force in Arkansas, where the suit was brought, transferred the title from these trustees to the Electric Company. Disposing of this contention the court, at page 400 of the opinion, said:

"Had the deeds to Allis, Bradford and Johnson shown on their face that they only held as trustees for the street railway company, then under the statute of uses, which is in force in this state, the legal and equitable title would have been merged in favor of the usee, the street railway company, but as the usee was not named in the deeds, the statute of uses does not apply."

In *Strimpfler v. Roberts, supra,* Black, C. J., says at page 301, (57 Am. Dec. 606).

"But here the warrant, deed poll, and patent, purport to give Dugan the legal, as well as the equitable title, for his own use, and that of his heirs and assigns. They do not on their face require him to hold it for the

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use of Benson. If there be anything *in pais* and outside of the written title, from which a trust of the land results to Benson, such a trust can be executed in no other way, than by the voluntary conveyance of the trustee, or by a decree in chancery, or (what is equivalent here), a judgment in ejectment."

In the case of *Little v. Lesia, supra*, the deed to be construed granted certain real property to Hiram L. Miller of Saginaw, administrator of the estate of Chas. Little, deceased. The question to be determined was whether Miller held the legal title, so that he might convey it, or whether the property had become part of the legal assets of the estate of Chas. Miller and subject to the disposition of the probate laws. Campbell, Judge, in disposing of this question says, at page 122:

"The legal interest covered by the deed, vested in Hiram L. Miller, as the only grantee named in the instrument capable of taking. Holding the legal title to that interest, he can convey it, unless restrained by statute. Whatever equities exist in the person interested in the estate, the legal holder, or trustee, is the only one who can pass the title. No express trust appears, and the grant of the estate is coupled with no restrictions. The statute provides that a naked trustee for the use of another takes no estate at all, but the title vests in the beneficiary: Comp. L. Chap. 86. But here, the deed is entirely different. It resembles that construed by this court in *Reed v. Winslow*, 2 Doug. Mich. 68; and any trust existing under it is an implied equity, and not a legal interest."

In *Trask v. Green, supra,* the court, by Christiancy, Judge, said at page 367:

"But secondly: Had the statute of uses been in full operation here at the time of these several conveyances, it would not have affected the present case: as that stat-

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ute never operated upon mere resulting trusts, or trusts arising by operation or implication of law, but only upon those express trusts actually created by the parties: *Garfield v. Hatmaker,* 15 N. Y. 477; *Moore v. Spelman,* 5 Denio, 225. Nor did it apply to or execute trusts created by parol, except in those cases where the conveyance of the legal estate might be by parol, as by feoffment: Shep. Touch. Ch. 9, p. 213; 7 Bacon's Abr. 92; 1 Greenl. Cruise, Tit. xi, Ch. 2, note to sec. 29, and authorities there cited."

In *United Brethren Church v. First M. E. Church, supra,* the form of the granting clause in the deed to be construed was as follows:

"To 'Josiah G. Heck, Adam Fries and Standard D. Wendell, trustees of the United Brethren Church and their successors in office, of the city of Moline,' * * * to have and to hold the same to said second party, 'and their successors and assigns forever.'"

The contention of the appellants was that this deed under the statute of uses transferred the title to the property in question direct to the church as *cestui que use.* That of the appellee was that it would be obviously contrary to public policy, as well as in direct contravention of the statute of frauds, to permit the statute of uses to execute implied resulting or constructive trusts, in other words secret trusts. The court, by Chief Justice Magruder, said:

"That the deed from Morphy put the legal title in the trustees named therein as grantees, and not in the corporation, does not seem to be denied by appellant, but it is claimed that such grantees held the property in trust for the Church, for the use of the Church, and that, under section 3 of the Conveyance Act, the trust was executed by the statute of uses, so as to vest the fee at once in the Church, as the *cestui que use.* (*Witham*

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v. Brooner, 63 Ill. 344.) But the statute of uses applies only to express trusts, and not to implied or constructive trusts, or trusts created by operation of law. (Tiedman on Real Prop., sec. 497.) In *Witham v. Brooner, supra,* we said: 'Under this statute a deed in the form of a bargain and sale must be regarded as having the force and effect of a feoffment; and, under the statute of uses, feoffment to A for the use of, or in trust for B, would pass the legal title to B.' But in the case at bar there is no express trust created. The deed made by Morphy does not convey the lot to the grantees in trust for, or to the use of, the church; it does not even convey it to them *as* trustees."

In 39 Cyc., at page 223, after stating the proposition that where the statute of uses has passed title to the *cestui que trust* the trustee cannot convey any title to the property, unless by direction or consent of the beneficiary, in other words, that the trust may be ignored, it is said:

"Of this nature is a trust merely to the use and benefit of a named beneficiary or beneficiaries, the only duty of the trustee being to hold the title, no trust being specified."

In Tiedman on Real Property, 3rd Ed., sec. 345, this is said:

"There must, furthermore, be some ascertained person *in esse* who is to take and who can take the use under the conveyance. * * * Any person *in esse* will fulfil the requirements of the statute. But if the *cestui que use* is not *in esse,* or not ascertained, the use is future and contingent, and the operation of the statute is suspended until the *cestui que use* is known."

Upon principle and authority it seems clear, therefore, that the statute of uses did not operate automati-

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cally to transfer the legal title to this property from the Bonanza Company to the Hanover Company.

It is unnecessary for the purposes of this opinion to determine the question of the admissibility of the parol evidence which was offered and received tending to show the relations of the parties and to establish the alleged trust. On the authority of *Johnson v. Calnan,* 19 Colo. 168, 34 Pac. 905, 41 Am. St. 224, such evidence undoubtedly would have been competent in a suit in equity brought for the purpose of having the character of the conveyance ascertained and the trust, if any, declared and enforced. However, in view of the fact that this evidence was for the most part offered and received without objection, it may not be amiss to consider just what it actually does establish. Unquestionably this evidence shows conclusively: First. That the Hanover Company had no interest in the property except such as was contingent upon the performance by it of precedent conditions, namely, the payment of the several notes aggregating $12,000 at maturity, which Barr had indorsed for it as surety, and upon which the purchase price of the property had been procured, conditions which the company confessedly never performed; and, Second. That it was agreed and understood that in case the company failed, as it did, to pay the notes according to their tenor and effect, and Barr should pay them, as he did, then the latter should be the real owner of the property and his co-trustees should convey to him. Thus it is shown that Barr held title to the property as trustee coupled with an interest, and that the Hanover Company's interest was but a contingent one. It is clearly apparent, upon the authorities already cited, that, under such circumstances, the statute of uses could not operate on this conveyance. The mere statement of the relations between the parties, as disclosed by this evidence, namely, that the Hanover Company's right was contingent and

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that Barr held as trustee, coupled with an interest, is the strongest possible argument against the operation of the statute. It follows, therefore, whether the decision is based solely upon the construction of the deed according to its express terms, or upon that instrument considered in the light of the explanatory evidence offered, that the Hanover Company never had more than a contingent interest in the property, and that the contingency upon which title could vest in it has not happened.

It is further contended that Barr, by reason of his conduct in procuring sale, under execution, of the Bonanza claim, upon his judgment against the Hanover Mining and Milling Company, purchasing the property at such sale and subsequently receiving and retaining the money paid by appellant in redemption, under its judgment against that company, is estopped from asserting independent title.

A statement of the condition of the title at the time of the Barr sale is necessary to a proper disposition of this contention. At that time the record title was in Crooks, Larrabee and Barr, trustees, by virtue of the deed from the Bonanza Mining Company. There was nothing of record to indicate that the Hanover Mining and Milling Company had any right or interest whatever in the property. The oral agreement between the various parties, Crooks, Larrabee and Barr, as trustees, and Barr, as an individual, and the Hanover Mining and Milling Company, whereby the Hanover Company might acquire title by repaying to Barr the $12,000, the purchase price of the claim, of which right Barr of course had full knowledge, was in existence, but this was all *in pais* and completely outside the record. There is nothing to show whether the appellant had or had not knowledge thereof, or that it had any knowledge whatever of the condition of the title of the Bonanza claim,

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other than such as is imputed to it by the record. Such was the situation when Barr brought suit, and when appellant redeemed from the Barr sale. There is no evidence that Barr had the slightest knowledge, at the time of this sale, that appellant had any claim against the company, or had any intention of redeeming from such sale. Under our statute any interest in land, whether equitable or legal, may be sold under execution, and Barr had a right to have execution against and sell any right or interest that the Hanover Company might have in the property, and of course such interest and only such as the Hanover Company actually had could be thus sold. No one could be misled by the action of Barr, as the record showed no title whatever in the Hanover Company. It is not claimed that either Barr or anyone for him made any representation to the appellant that the right or interest of the Hanover Company in the property was other than that which the testimony introduced showed it to be. In *Copeland v. Colorado State Bank of Durango,* 13 Colo. App. 59 Pac. 70, it is said:

"At an execution sale, the proceedings in connection with which have been regular and valid, the purchaser takes whatever title or interest the execution defendant may have; and it is of the defects in that title that he assumes the risk. If the defendant has good title, the purchaser gets it; if a partial title, he gets that; or, if no title, he gets nothing: but he takes his chances on the title the defendant has, and if that proves worthless, he is without remedy. It behooves him to acquaint himself with the title before purchasing; and his complaint afterwards that it was unsatisfactory, will not be heeded."

Since, with us, any interest in real property, no matter what, is subject to execution, there is no rule

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of law or morals which prevents an execution creditor from levying upon and selling any property or interest therein which he even suspects an execution debtor may have. It is a well settled rule that to such sales the rule *caveat emptor* applies. 24 Cyc. 57. The fact that Barr already claimed, or in fact had an interest in the property is no reason why he might not subject any interest therein, held by some one else, to a sale pursuant to a judgment against such other. Upon this proposition there can be no manner of doubt. It is specifically supported by the following authorities.—*Seaman v. Hax,* 14 Colo. 536, 24 Pac. 461, 9 L. R. A. 341; *Martin v. Zellerbach,* 38 Cal. 300, 99 Am. Dec. 365; *Thomas v. Bowman,* 30 Ill. 84; and *Matless v. Sundin,* 94 Iowa, 111, 62 N. W. 662. In the latter case the court said (94 Iowa, at page 114, 62 N. W., at page 663):

"It is well settled that the rule *caveat emptor* applies to sheriff's sales, and that the interest sold under the execution is that of the judgment debtor."

Appellant contends that the appellee stood by and allowed this property to be sold as belonging to the Hanover Company without objection and without giving warning of the condition of the title. In response to this it is sufficient to say that there is no evidence that the appellee ever knew of the redemption by the appellant, or of its intention to redeem, until after the redemption had been accomplished. Barr knew that the Hanover Company had a contingent right or interest in the property, and it was that interest and that only which he sought to, or did, or could sell. We do not know, and certainly the appellant has failed to indicate, how Barr could have prevented the redemption even if he had desired or attempted to do so. While it is true Barr claimed ownership based on the failure of the Hanover Company to comply with the condition under which it might ac-

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quire title from the trustees, as a precautionary measure, he had a right to offer for sale and buy whatever contingent interest, valuable or otherwise, the Hanover Company had in the property.

There is no pretense that the sale was other than a good faith transaction. The appellant, by its redemption from the Barr sale, acquired whatever contingent right or interest in the property the Hanover Company had, that being the interest sold under the Barr execution. That it never sought to exercise that right by offering to reimburse Barr, and demanding the legal title does not change the fact that it might have done so. Whether such right still exists we neither affirm nor deny.

As already indicated, an execution creditor is entitled to sell any pretended right or interest of a judgment debtor in any property. If it turns out that he had no right or interest, nothing passes. But the mere levy of an execution is not a warranty, nor even a declaration, that the judgment debtor has in fact any interest or title. The act of causing property to be sold under execution is at most no more than an assertion that the judgment creditor either has, or claims to have, some title or interest in the property, but it is not an averment that in point of fact he has any such title or interest, much less that he has valid title. The doctrine of estoppel *in pais* proceeds wholly on the theory that the party to be estopped has, by his declaration or conduct, misled another to his prejudice, so that it would be a fraud upon such other to allow the true state of facts to be proved. It cannot be said that a judgment creditor, by the mere fact of causing whatever interest or pretense of interest a judgment debtor may have, to be sold under execution, has deluded a purchaser at such sale into the belief that the debtor has good title. *Martin v. Zellerbach, supra.*

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The duty is upon the purchaser to be diligent in inquiry and ascertain what the facts are respecting such interest or title. There is not the slightest showing in this case that appellant made any inquiry whatever, or exercised the slightest diligence, to learn the facts.

Furthermore, no sufficient plea of estoppel or proof to sustain it is found in the record. All that is alleged and shown to have been done on the part of appellee in this connection was to cause the property to be sold under his judgment against the Hanover Company, from which sale the appellant redeemed. It is neither alleged nor proved that Barr said or did a solitary thing respecting such title or interest, either calculated or intended to mislead, or that appellant was thereby in any way influenced or induced to redeem.

The case of *Blodgett v. Perry,* 97 Mo. 263, 10 S. W. 891, 10 Am. St. 307, is one where the facts alleged to support the plea of estoppel are quite similar to those in this case. There plaintiff brought an action of ejectment. Defendant answered setting up the following facts: That the Union Bank of Missouri, through which plaintiff derived title and for which he was attorney during the proceedings hereinafter mentioned, commenced an action by attachment against one Perry, and the writ of attachment was levied upon the land in controversy; judgment was recovered against Perry and a special execution was issued thereon and levied upon the land in controversy, and after advertisement the land was sold under the execution and bought by one Shumate, through whom defendant derived title. The wording of the part of the answer material to our present purpose is as follows:

'That at the sale under the execution aforesaid, said Shumate, relying upon the acts of said bank in attaching, advertising and selling under execution the real es-

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tate in controversy, as the property of Amos M. Perry, as a declaration, admission and assertion of said bank that it was not the owner of said real estate and that said Amos Perry was the owner thereof, purchased the same and paid therefor a valuable consideration."

After sale Shumate assigned the certificate of purchase to defendant, who received a sheriff's deed to the premises. The plaintiff purchased from the bank with full knowledge of all the foregoing facts; he claimed that the bank was estopped from asserting any title to the land acquired from Perry by it prior to the sale to Shumate. Plaintiff based his claim of title upon a deed executed by Perry to the bank prior to the levy of the attachment and execution and recording. The court held that the bank and the plaintiff were not estopped, by sale of the land under execution as the property of Perry, from asserting their own title. The court said in part, at pages 272-274, (10 S. W. 892, 10 Am. St. 307.)

"This plea is plainly bad on its face. It does not contain within its allegations a single element of estoppel. It is not alleged that Shumate was misled by any act of the Union Bank or of plaintiff, or that he was in ignorance of the true state of the title, or that the former deed to the Union Bank was not put to record, or that the act of the Union Bank induced Shumate to buy the land which otherwise he would not have bought. * * *

Furthermore, there must be a *certainty* about the alleged estoppel; the misrepresentation must be plain, not doubtful or matter of mere inference or opinion; for the courts will not suffer a man to be deprived of his property or security where he had no intention to part with it. It is much the same thing to say that the representation or conduct is such as would naturally lead to the action taken; that is, it should be such as to justify

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a prudent man to act upon it. Bigelow on Est. (3rd Ed.) 490, 491. Tested by these authorities, and the rule they enunciate, the plea was wholly worthless."

In the case of *Griffith v. Wright,* 6 Colo. 248, the court briefly summarizes, at page 249, the essentials of an estoppel by conduct as follows:

"First. There must have been a representation or concealment of *material facts.*

Second. The representation must have been made with *knowledge* of the facts, unless the party making the representation was bound to know the facts, or ignorance of them was the result of gross negligence.

Third. The party to whom it was made must have been *ignorant* of the truth of the matter.

Fourth. It must have been made with the *intention* that the other party should act upon it; but gross and culpable negligence on the part of the party sought to be estopped, the *effect* of which is to make a fraud on the party setting up the estoppel, supplies the place of intent.

Fifth. The other party must have been induced to act upon it."

In *Davidson v. Jennings,* 27 Colo. 187, 200, 60 Pac. 354, 358, 48 L. R. A. 340, 83 Am. St. 49, this court adds the following corollary to the above propositions:

"To entitle a party to invoke the doctrine of estoppel, he must actually have been misled and induced to act to his prejudice by reason of another's conduct, he having on his part exercised due diligence to ascertain the truth. In *Moore v. Bowman,* 47 N. Y. 494, the doctrine is thus concisely stated:

'To have this effect, however, the defendant must actually have been misled by the plaintiff's conduct, and induced thereby to change his position. If he is not so misled * * * and with a reasonable use of means within his

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reach he might have ascertained the fact, he could not set up an estoppel. The truth is, the party setting up an estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth.'

There is neither pleading nor proof to show misrepresentation or concealment, or that Barr's action led appellant to part with its money, or that it would not have redeemed but for the acts of Barr, or that it was not fully advised of the exact situation. In law the appellant was charged with notice of the then record title, which disclosed no interest in the Hanover Company. It seems clear, therefore, that appellant redeemed from the Barr sale at his own risk, and cannot now be heard to urge estoppel against the latter in his claim of title and right of possession. Owing to the peculiar character of the pleadings and manner of conducting the trial in the court below, it is but just, to the attorneys for appellant to say that their connection with the case began in this court.

The judgment should be affirmed, and it is so ordered.

Decision *en banc*.

MR. JUSTICE GABBERT, MR. JUSTICE GARRIGUES and MR. JUSTICE SCOTT dissent.

SCOTT, J., dissenting:

I am of the opinion that the deed to the trustees in this case, operated under the statute of uses, as a direct conveyance from the Bonanza Company to the Hanover Company, and further, that the defendant Barr, a trustee under the deed, and who of all persons should have known of the secret oral agreement relied on, if there was such agreement, by his conduct in procuring the levy

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and sale of the premises, as being the property of the Hanover Company, and in accepting the money of the Ohio Company in redemption from such levy and sale, is estopped to question the title of the Ohio Company.

Mr. JUSTICE GABBERT dissenting:

The testimony establishes that the Hanover Company paid the purchase price, and the title to the property was taken in the name of Barr, Larrabee and Crooks, trustees. Under this state of facts the title was held in trust by the grantees, for the benefit of the Hanover Company by operation of law. *Lipscomb v. Nichols,* 6 Colo. 290.

It further appears from the testimony that the purpose of having the title vested in the trustees, was to secure Barr against loss in having indorsed the notes given by the Hanover Company for the money it borrowed with which to make the purchase. This state of facts is established by parol testimony only, and is an attempt to create a trust or interest in the property in favor of Barr, which section 6, of the Statute of Frauds, section 2660, Rev. Stat. 1908, expressly inhibits being created in this manner; that section states: "No estate or interest in lands, * * * nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing." When, therefore, it appears that the title to the property was held in trust by Barr and his co-trustees, for the benefit of the Hanover Company, which title the Ohio Company has acquired, Barr

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cannot be heard to assert that he has an interest therein superior to the Ohio Company by virtue of a parol agreement with the Hanover Company, which under the statute is void. The trust attempted to be established by Barr is an express one. Where this class of contracts relates to an interest in lands, the statute of frauds, to which we have referred, requires that they shall be manifested and proved by writing.—*Learned v. Tritch*, 6 Colo. 43.

The writer is authorized to state that Mr. Justice Garrigues concurs in this opinion.

Decided November 2, A. D. 1914. Rehearing denied December 7, A. D. 1914.

[No. 7675.]

EPPICH v. BLANCHARD.

1. FRAUDULENT CONVEYANCES—*Creditor's Bill—Requisites.* A bill brought by one who at execution sale has purchased lands of his debtor, to vacate a previous conveyance by the debtor, as fraudulent, must, as against the alleged grantee in fraud, affirmatively allege the insolvency of the debtor, or that he had no other property than the lands in question from which the judgment might have been satisfied. (142)

2. ——*Statute Construed.* Section 2665 of the Revised Statutes relates to personal property exclusively. (144)

Under Rev. Stat. Sec. 2674 the question of fraudulent intent is one of fact. Although it appeared by the pleadings that the grantor in the alleged fraudulent conveyance reserved to herself a beneficial interest in the property, it was held that the conveyance was not to be adjudged fraudulent in law. (144)

3. PLEADINGS—*Motion for Judgment Upon.* On plaintiff's motion for judgment on the pleadings the averments of the answer are taken as true, and if these raise a material issue of fact the motion must

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be denied. The motion cannot be made to serve the purpose of a general demurrer. *Benson v. Hoover* 3 Col. Ap. 467, *Rensberger v. Britton* 31 Colo. 77, *Borcherdt v. Favor* 16 Col. Ap. 406, distinguished. (142)

4. PARTIES—*Necessary Defendants.* Upon bill to vacate a conveyance of lands as fraudulent one alleged to have an interest as beneficiary in a trust under the conveyance, is a necessary party. (145)

Error to Denver District Court.—Hon. HARRY C. RIDDLE, Judge.

MR. CHAS. G. CLEMENT, MR. FRANK MCLAUGHLIN, for plaintiff in error.

MR. GEORGE Q. RICHMOND, for defendant in error.

MR. JUSTICE BAILEY delivered the opinion of the court:

The defendant in error, Blanchard, brought suit against the plaintiff in error, Eppich, and others, to quiet title to certain real property situated in Denver that had been sold under execution on a judgment obtained by Blanchard against one Anna J. Barnard, former owner of the property, who was joined as a defendant in this action. Barnard, while the property yet stood of record in her name, gave a promissory note for $1,000 to I. F. Peck and wife, which later passed by indorsement to Blanchard. In April, 1909, Blanchard recovered judgment thereon against Barnard, who, before such judgment was rendered, executed to Eppich her warranty deed for the property in question, dated April 2, 1909, reciting a consideration of one dollar, which deed was forthwith recorded. On the same day Eppich executed a trust agreement, in connection with that conveyance, for the benefit of Barnard and one Frank McLaughlin, which was not recorded. McLaughlin's interest arose out of a contract with Barnard, by which he forbore

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prosecuting a certain action theretofore instituted against her to recover a large sum of money said to be due him, claiming a lien against the property in suit, with *lis pendens* filed, upon condition that she deed the property to Eppich for their mutual benefit, to be disposed of on terms set forth in the trust agreement. The property was at all times mentioned subject to other encumbrances which have no bearing upon the merits of this controversy. Blanchard caused this property to be sold as the property of Barnard under the judgment recovered against her, as a result of which a sheriff's deed purporting to convey to Blanchard all right, title and interest, legal and equitable, of Barnard therein and thereto, was regularly and duly executed on March 22, 1910.

The complaint alleges, among other things, that the deed to Eppich was without consideration, wholly voluntary, sham and fictitious, made with knowledge of the indebtedness of Barnard to the plaintiff, Blanchard, in connection with the secret trust agreement, with the fraudulent intent and purpose of preventing and defeating his claim, and prays to have the same declared void and set aside as casting a cloud on his title. The answer of Barnard admits the allegations of the complaint, and sets up the execution and delivery by her, since the institution of this suit, of a quitclaim deed to Blanchard of any and all her right, title or claim in and to the premises. Eppich answering denied that the conveyance to him was without consideration, voluntary, sham or fictitious, made with knowledge of the indebtedness of Barnard to Blanchard, or with fraudulent intent or purpose of defeating a recovery by Blanchard of any sum due from Barnard. As a separate and further defense, and as a consideration for the conveyance to him by Barnard of the property in question, Eppich sets up a composition

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between Barnard and McLaughlin of their differences, fixing the amount of her indebtedness to the latter, and providing for its payment out of a portion of the proceeds to be derived from a disposition of the property in question by Eppich under the terms of the trust agreement, and the dismissal accordingly of the McLaughlin suit against Barnard, to which reference has been hereinbefore made. It was further alleged that McLaughlin is a necessary party to a final and complete determination of the issue involved, with prayer to have him made a defendant. Plaintiff moved for judgment on the pleadings, which was sustained, and Eppich prosecutes this writ of error.

The first proposition urged for a reversal is that the complaint states no cause of action. There is no allegation that the defendant Barnard was insolvent, or had no other property from which the judgment in question could be satisfied. These were necessary and essential allegations to warrant recourse to equity for relief. To state a cause of action in equity a complaint must affirmatively show that plaintiff has no full, adequate or speedy remedy at law.—*Bursdall v. Waggoner,* 4 Colo. 256; *Emery v. Yount,* 7 Colo. 107, 1 Pac. 686; *Spooner v. Travelers' Ins. Co.,* 76 Minn. 311, 79 N. W. 385, 77 Am. St. 651; and 2 Moore on Fraudulent Conveyances, page 851, and cases cited. The complaint here does not even purport to do this, and was therefore clearly insufficient because of such failure.

The second ground urged under the assignments is that the court erred in rendering judgment on the pleadings. This objection is well laid. On motion for judgment upon the pleadings the allegations of the answer are taken as true, and since there is here a material issue of fact raised, no such judgment was warranted.—*Lowell v. Bonney,* 14 Col. App. 230, 60 Pac. 830; *Mills v. Hart,*

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24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; *Hastings v. Bank of Longmont,* 4 Colo. App. 419, 36 Pac. 618; *Rice v. Bush et al.,* 16 Colo. 484, 27 Pac. 720; *Porter v. Grady,* 21 Colo. 74, 39 Pac. 1091; *Richards et al. v. Stewart,* 53 Colo. 205, 124 Pac. 740; and *Kimber v. Gunnell Gold M. & M. Co.,* 126 Fed. 137, 61 C. C. A. 203.

It is a well settled rule that a motion for judgment on the pleadings cannot be made to serve the purpose of a general demurrer, which was the sole effect of that motion in this instance.—*Whitehead v. Johnson,* 51 Colo. 587, 119 Pac. 472; and *Shuler v. Allam,* 45 Colo. 372, 101 Pac. 350. No case is cited, nor do we think one can be found, holding that where material allegations of a complaint are directly and specifically put in issue by answer judgment on the pleadings should be allowed. Such a rule would be wholly arbitrary and without legal support.

Defendant in error cites *Ebensen v. Hoover,* 3 Colo. App. 467, 33 Pac. 1008; *Rensberger v. Britton,* 31 Colo. 77, 71 Pac. 379; and *Borcherdt v. Favor,* 16 Colo. App. 406, 66 Pac. 251, in support of the judgment on the pleadings. These cases announce a rule applicable where the facts constituting a cause of action are specifically admitted, or where new matter is pleaded showing an independent transaction, not connected with anything set up in the complaint, and which, therefore, could not be properly presented, considered or disposed of in such proceeding. Manifestly those decisions are not authority on the question presented by the pleadings in this case. Here the allegations of fraudulent intent and purpose are specifically denied, and that issue is directly and properly tendered.

Section 2665, R. S. 1908, provides:

"All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or

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things in action, made in trust for the use of the person making the same, shall be void, as against the creditors existing of such person."

This section is evidently the one upon which the trial court based its judgment, as evidenced by its written opinion. Plaintiff in error claims it is applicable only to personal property, and that this being a case involving real property the provisions applicable to it are Sections 2671 and 2674, R. S. 1908, respectively, which read as follows:

"Every conveyance or assignment in writing or otherwise, of any estate or interest in lands, * * * made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debt or demands, * * * shall be void."

"The question of fraudulent intent, in all cases arising under the provisions of this title, shall be deemed a question of fact, and not of law; nor shall any conveyance or charge be adjudged fraudulent against creditors or purchasers solely on the ground that it was not founded on a valuable consideration."

By its express terms Section 2665, *supra,* relates solely to personal property.—*Wilson v. American National Bank,* 7 Colo. App. 194, 42 Pac. 1037. In *Brown v. Perault,* 5 Idaho, 729, 51 Pac. 752, a like conclusion was reached upon identically the same character of statutory provision. In the cases of *Brown Bros. M. Co. v. Israel,* 15 Colo. App. 392, 62 Pac. 578, and *Wilson v. American National Bank, supra,* relied upon by defendant in error, transfers of personal property only were the subject-matters under consideration. The case at bar falls under Sections 2671 and 2674, *supra,* and the question of fraudulent intent becomes one of fact by direct provision of the statute.—*Thomas et al. v. Mackey et al.,* 3 Colo. 390. This issue was squarely presented by the

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pleadings and should have been tried as a fact upon the proofs adduced. But the court, contrary, to this provision of the statute, because it appeared from the pleadings that the grantor in the deed to Eppich had a beneficial interest in the property reserved to her by the trust agreement, upon motion for judgment on the pleadings, declared the deed void as matter of law, without investigation of the facts. This was error.

Further, it is contended that McLaughlin was a necessary party to the action. The answer specifically alleged this and recited a trust agreement showing him to be a beneficiary thereunder. He was directly affected by the judgment and should have been made a party to the action.—*Allen v. Tritch*, 5 Colo. 227; and *Seymour v. Fisher*, 16 Colo. 188, 202, 27 Pac. 240.

The judgment is reversed and the cause remanded with directions to proceed in conformity with the views herein expressed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

[No. 7728.]

GROMM v. FYBUSH ET AL.

Judgment predicated upon finding of facts not supported by any testimony reversed.

Error to Denver County Court.—Hon. GEO. W. DUNN, Judge.

Mr. W. W. DALE, and MESSRS. ORAHOOD & ORAHOOD, for plaintiff in error.

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Mr. R. A. SMITH, and Messrs. BICKSLER, BENNETT, DANA & BLOUNT, for defendants in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Gromm refused to accept goods ordered of Fybush Brothers and returned them, for the reason that they were not of the quality ordered. The latter refused to receive the goods, and brought suit for the contract price. The sole issue of fact was whether the goods were of the quality ordered. The court found this issue in favor of the plaintiffs and rendered judgment against defendant.

The testimony on the part of the defendant stands undisputed that the goods were much inferior to the samples from which they were ordered. True, plaintiffs introduced testimony, which was intended to prove that they were of the same quality as the samples, but it did not tend to contradict the testimony of the defendant. A judgment predicated upon a finding of fact which there is no testimony to sustain is erroneous. The judgment of the County Court is reversed and the cause remanded for a new trial.

Judgment reversed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

Decided Nov. 2, A. D. 1914; Rehearing denied December 7, A. D. 1914.

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[No. 7767.]

LEWIS v. WEITBREC.

1. PLEADINGS—*Irrelevant Answer*, may be stricken from the files on motion. Rev. Code Sec. 66. (150)

2. EQUITABLE LIEN—*When Allowed.* One who having entered into an agreement with an agent for the purchase of the lands of his principal, submits to the repudiation thereof by the principal, and, treating the contract as broken, abandons his right to consummate the purchase, is not entitled to an equitable lien for the damages occasioned by the loss of his bargain, or moneys expended by him in preparing, before the repudiation of the contract, to perform it, even though the principal has no property except the lands, and is proposing and attempting to dispose thereof. (151, 153)

Error to Pueblo District Court.—Hon. C. S. ESSEX, Judge.

Mr. EDWARD C. STIMSON, and Mr. LAWRENCE LEWIS, for plaintiff in error.

Mr. M. G. SAUNDERS, and Mr. E. F. CHAMBERS, for defendant in error.

Weitbrec, as plaintiff, brought suit against Lewis, as defendant, to remove a cloud upon his title to the 3-R Ranch. The defendant answered and also filed a cross-complaint and counterclaim. On motion of plaintiff this pleading was stricken. Plaintiff then moved for judgment on the pleadings, which was granted. Defendant brings the case here for review on error. A Mr. Morris was also made defendant, but as he does not complain of the judgment rendered, we merely mention the fact as explanatory of allegations in the pleadings, which it is necessary to summarize in order to consider the questions upon which the defendant, Lewis, relies as constituting reversible error.

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The complaint alleged that plaintiff was the owner in fee and in possession of the 3-R Ranch; that defendants, or one of them, on August 30th, 1909, placed on record a contract, which stated that Morris, as the agent of Wietbrec, contracted to sell Lewis the ranch; that this contract was made and entered into without authority from plaintiff; that he never confirmed nor ratified it; that it cast a cloud upon his title; that he first gained knowledge of it August 25, 1909, and three days later notified defendants that he repudiated it. He then alleged that defendants claimed some right or interest to the property adverse to him, and prayed that the contract be declared null and void, and that defendants be decreed to have no interest in the ranch under the contract. For answer, defendant Lewis, admitted that plaintiff was the owner in fee and in possession of the ranch, subject to the liens and claims of the defendants; admitted that he filed the contract for record, and that he declined to have it released or cancelled; alleged that the contract was entered into with Morris, as agent for plaintiff, and that Morris was authorized in writing to execute the contract; that August 19, 1909, plaintiff had knowledge of its terms; that he did not object until August 28, 1909, and that he ratified and confirmed it. Lewis further alleged that he and his associates were ready, able and willing to carry out the contract; that he so advised plaintiff, but that he, the plaintiff, declined and refused to comply with its terms and conditions. Lewis further admitted that he claimed an equitable lien on the ranch by virtue of the contract to the extent of ten thousand dollars. For further answer cross-complaint and counterclaim the defendant Lewis, alleged that plaintiff was the owner in fee, subject to the liens of the defendants on the property involved; that plaintiff constituted Morris his agent for sale of the property by

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a written agreement, dated April 3, 1909; that Lewis organized a syndicate for the purchase of the property, which fact was communicated to plaintiff; that plaintiff notified Morris of the termination of his agency, and that Morris and Weitbrec fixed the time of expiration as midnight of August 19, 1909, but that the day previous, Morris, as agent for plaintiff, entered into the contract which plaintiff asked to have cancelled; that plaintiff was fully advised of the negotiations between Lewis and Morris; that after the execution of the contract telegrams and letters were sent to Weitbrec notifying him of its execution; that plaintiff, though informed that Lewis and his associates, were proceeding with preparations to carry out the contract, and were expending money for this purpose, acquiesced therein and did not attempt to repudiate it until August 28, 1909; that on that day plaintiff wrote defendant that he declined to recognize the contract; that Lewis, at the time of the execution of the contract, and for a long time thereafter, was ready, willing and able to perform it; that he repeatedly so notified plaintiff, but that by plaintiff's actions it was clear that a tender of performance would be idle and unnecessary; that Lewis was thereby deprived of his bargain and damaged in the sum of ten thousand dollars; that plaintiff has no other property than the ranch, and that he is now attempting and is about to dispose of it, and if so disposed of Lewis will have no adequate remedy at law. Based on these allegations, Lewis prayed that the ranch be charged with an equitable lien in the sum of ten thousand dollars, or at least that the decree, if any is rendered, cancelling the contract, be made conditional upon plaintiff doing equity by paying Lewis the amount of the damages which he has sustained by reason of the alleged wrongful acts of plaintiff.

The motion to strike the further answer stated as

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grounds therefor, that it was irrelevant, immaterial and insufficient, and did not contain allegations of fact constituting a defense or counterclaim to plaintiffs' cause of action. The defendant objected to the court considering this motion for the reason that the questions thereby raised could only be presented by demurrer. The motion to strike, as stated, was sustained, and judgment then rendered on the pleadings in favor of plaintiff, to the effect that plaintiff was the owner and entitled to the possession of the ranch, and that defendants had no interest therein. The court did not order the contract cancelled, but in the decree stated that whether defendants, or either of them, had any right of action against plaintiff on a plain money demand, growing out of the matters set forth in the pleadings, was not determined by the judgment. The errors assigned are substantially embraced in the following: (1) that the court erred in ruling and holding that the sufficiency of the cross-complaint and counterclaim could be tested by the motion to strike; (2) that the court erred in sustaining the motion for the reason that defendant was entitled to interpose the defense and claim set forth in his further answer and cross-complaint.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Section 60 of our Civil Code (Mill's), section 66, Revised Code 1908, provides that sham and irrelevant answers and defenses may be stricken on motion. Here then is authority to strike an answer which is irrelevant, and the question raised by the motion is not whether the pleading, to which it was directed, stated a cause of action, but whether the facts, therein alleged, were relevant to the cause stated in the complaint. It was therefore proper to raise this question by motion to strike,

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and not by demurrer; and the important point is whether the further answer, cross-complaint and counterclaim was relevant to the cause of action, to which it was interposed as a defense.

Counsel for defendant contend that the action by plaintiff has a double aspect in that it is to remove a cloud upon title and cancel a contract, which it is asserted, constitutes such cloud. This is not entirely accurate. According to the complaint, plaintiff is the owner and in possession of the ranch. The purpose of his action is to secure a decree declaring that defendants have no interest in the ranch by virtue of a contract of record executed by Morris without authority, which is a cloud upon his title. Lewis, by his pleading, under consideration, puts the averment of the want of authority of Morris to execute the contract in issue; avers notification to plaintiff, that he was able and willing to perform it; alleges that he never tendered specific performance because it was clear that to do so would be idle, and that he was thereby deprived of his bargain to his damage in the sum of ten thousand dollars, for which he prays an equitable lien on the premises, or that a decree cancelling the contract be made conditional upon plaintiff paying him that sum. In brief, this pleading avers that plaintiff is bound by the contract, but treats it as breached, and claims unliquidated damages in the sum of ten thousand dollars on account of the failure of plaintiff to abide by his contract, which sum defendant asks to be decreed an equitable lien on the ranch.

The contract purported to give defendant the right to consummate a purchase, upon terms therein specified, but he has abandoned that right and counts upon damages for its breach. Consequently, the contract, with respect to specific performance, is no longer in force. It does not give Lewis any lien for damages for a breach

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and the only right defendant now has, under the contract, according to the averments of his pleading, is an action for damages, which he attempts to assert in a suit by Weitbrec, to have it removed as a cloud upon his title. He bases this right upon the averment that plaintiff is bound by the contract, but this does not entitle him to any interest in the ranch under the contract. In an action to remove a cloud upon title, the defendant, by his answer, must state facts from which it appears that he has an interest in the property involved by virtue of the instrument which it is alleged constitutes a cloud, and not merely a right to a personal action against the plaintiff under such instrument, otherwise his pleading is irrelevant, and under the provisions of the code to which we have referred, may be stricken.

The case is no different from what it would have been, so far as any question in this case is involved, had plaintiff merely averred in his complaint that he was the owner and in possession of the ranch; that defendant claimed an interest therein adverse to plaintiff, which was without foundation, and defendant, in his answer, had set up the execution of the contract; its breach by plaintiff; that specific performance had not been tendered because plaintiff had refused to recognize the contract, and defendant had claimed damages for its breach. Clearly, such an answer would not have exhibited any interest of defendant in the premises and would have been irrelevant.

Summarized, the action by plaintiff was to obtain a decree, declaring that defendants were not entitled to any interest in the premises by virtue of the contract executed by Morris. Lewis, by his pleading, discloses that he has no interest in the ranch under this contract, but counts on damages for its breach. This cannot operate to defeat the right of plaintiff to a decree to the

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effect that Lewis was without interest in the premises by virtue of the contract. With respect to a cross-complaint and counterclaim, the law, as applicable to the case at bar, bearing in mind its nature and purpose, is that it must state a caues of action from which it appears that defendant is entitled to such affrmative relief against the plaintiff as will defeat his right, either in whole or in part, to have the cloud upon his title removed.—Bliss on Code Pleading, sec. 386, 387; *Mattoon v. Baker,* 24 How. Pr. Rep. 329; *Osmers v. Furey,* 32 Mont. 581, 81 Pac. 345; *Meyer v. Quiggle,* 140 Calif. 495, 74 Pac. 40.

The judgment of the District Court is affirmed, but in so doing, we do not hold that defendant, Lewis, may not have an action for damages. That question is not involved, and as stated in the decree of the trial court, the right of Lewis and Morris, or either of them, to maintain an action on a plain money demand against the plaintiff, growing out of the transaction set out in the pleadings, is not intended to be, and is not determined.

Judgment affirmed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

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[No. 7782.]

HARRINGTON v. HARRINGTON.

1. STATUTES—*Repeals by Implication*, are regarded with high disfavor, especially when the statute alleged to have been repealed was founded in experience, and grave considerations of public welfare. (159, 160)

A statute without negative words will not repeal existing legislation unless there is an unavoidable repugnancy. (159)

A statute enacted in 1887 allowed a writ of error at any time within three years from the date of the judgment (Rev. Code. Sec. 436). This statute remained in force, applicable to all manner of causes, until 1893. A statute enacted in that year limited the time for suing out a writ of error to review a decree of divorce to six months (Rev. Stat. Sec. 2123). By Sec. 8 c. 6 of the Laws of 1911, (an Act revising the law relating to appeals and writs of error,) it was again provided that "A writ of error shall not be sued out after the expiration of three years" from the date of the judgment, and all acts and parts of acts "inconsistent herewith" were repealed. *Held* the latter statute had not the effect to repeal Rev. Stat. Sec. 2123. (159)

2. DECREE—*Relates to Pronouncement.* The formal entry of a decree is a purely clerical matter. Whenever done in conformity with the original pronouncement it relates back thereto, and it is not improper to expressly declare that it is done as of such former date. (160)

3. LIMITATION—*How Pleaded.* A writ of error sued out after the lapse of the statutory limitation may be dismissed on motion. (155, 161)

Error to Larimer District Court.—Hon. JAMES OWEN, Judge.

Mr. L. D. THOMASON, Mr. F. J. ANNIS, for plaintiff in error.

Messrs. LEE & AYLESWORTH, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

As plaintiff, Lizzie B. Harrington, plaintiff in error here brought action for divorce against the defendant Fred

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M. Harrington, defendant in error here, in the District Court of Larimer County. October 22, 1910, the jury rendered a verdict against her, and in favor of defendant upon cross-complaint. Plaintiff filed a motion for a new trial, which was denied. December 6, 1910, judgment was rendered on the verdict in favor of defendant, but entry thereof suspended for ten days. Nothing more was done in the case until May 1, 1911, when the decree of divorce was formally entered of record, and plaintiff prayed and was allowed an appeal to this court. On August 19, 1911, plaintiff abandoned her appeal to this court, and filed a motion in the court below for an order vacating and annulling the decree entered on May 1st and setting aside the order denying the motion for a new trial, requesting that she be permitted to file additional grounds for a new trial. It appears that defendant remarried in another state before the actual formal entry of the divorce decree in his favor. This alleged bigamous act was relied upon in the motion to reopen and vacate the decree, which was overruled September 5, 1911. On this day the defendant interposed a motion to have the decree of divorce which was entered of record May 1, 1911, amended by adding to the last sentence thereof the words: "done as of December 16, 1910," which was allowed and the amendment made accordingly. Whereupon plaintiff sued out this writ of error to review the amended decree.

On March 28, 1912, the record on error was filed in this court and the writ of error issued. Defendant appeared specially and moved a dismissal of the writ, upon the ground that more than six months had elapsed after the date of entry of the decree before the writ was sued out. May 9, 1912, this court entered an order overruling the motion to dismiss, without prejudice, however, to the right of defendant to argue such motion at length

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upon final hearing on the merits. The cause was transferred by this court to the Court of Appeals and remanded on petition of defendant, pursuant to Section 5 of an act entitled Court of Appeals, Session Laws 1911, page 266.

The main contention involves a construction of Section 8 of Chapter 6, Session Laws 1911, concerning appeals and writs of error, which reads as follows:

"A writ of error shall not be sued out after the expiration of three years from the making or entering of the judgment or decree complained of; but when a person thinking himself aggrieved by any judgment or decree that is the subject of review in the Supreme Court shall be an infant, *non compos mentis* or imprisoned when the same was so made or entered, the time of such disability shall be excluded from the computation of the said three years."

Section 25 of the act repeals all acts and parts of acts inconsistent therewith. The question is whether Section 2123, R. S. 1908, providing that a writ of error from any decree granting a divorce shall be sued out within six months from the date of such decree and not after, was thereby repealed.

The Code of Civil Procedure enactment of 1887 contained a provision fixing the time at three years in which to sue out a writ of error. This general provision remained intact for six years. Its vice was soon detected when applied to proceedings in divorce, and consequently the legislature, in 1893, limited the time for suing out the writ in such cases to six months. This provision is Section 2123, *supra*. The act of 1911 expressly repealed the entire subdivision of the Code of 1908 entitled Appeals and Writs of Error, which included the provision of 1887 upon that subject. This court, in the case of *Dennis v. The People,* 55 Colo. 120, 133 Pac. 741, considered

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the purpose and effect of this act, and held that, although its language is, perhaps broad enough to apply to criminal cases if such was the intention of the legislature, it nevertheless purports to be an amendment to the civil code and does not apply to such cases. The court said:

"The foregoing considerations and many others that might be mentioned make it appear plain that it was the intention to gather in one body as much as possible the provisions of the civil code relating to the review of civil causes, amend them where amendment seemed desirable and to make the writ of error the sole method of review. The whole act purports to be an amendment to the civil code without specifically saying so, and while criminal cases may be included within some of the words of the act, they are not included within the plain purport and intent thereof."

If, for the reasons stated, the act does not alter or repeal statutes governing criminal cases, they being governed by special provisions, it is equally true, upon like considerations, that it does not alter or repeal the special provisions relating to divorce proceedings. The primary purpose and effect of the act was to amend the civil code, and it cannot be held to amend or repeal statutes controlling proceedings to which the civil code does not apply, unless it does so directly. Section 6 of the new act expressly repeals "all statutes granting and regulating appeals from district, county and juvenile courts, in all actions, suits and proceedings, both civil and criminal." This indicates that the legislature, in thus specifically abolishing the right of appeal given by Section 2123, *supra,* in divorce proceedings, intended, by the very fact that it does not refer to the provision of that section relating to writs of error, to permit it to stand undisturbed. Moreover, as the later act expressly repealed the entire

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subdivision of the Code of 1908 relating to appeals and writs of error and is in purpose and effect limited to amending the civil code, the provision therein that "all acts and parts of acts inconsistent herewith are hereby repealed" must be held to apply only to all acts and parts of acts of the civil code inconsistent with the new act.

Section 8 of the act of 1911, *supra,* is substantially identical in word and line with the provision of 1887 upon the subject of writs of error, as the same appears in the Code of 1908. Nowhere in the act is there any reference made to Section 2123, *supra,* and if it repealed this section, it did so purely by implication. That such is its effect cannot be conceded, for it would be illogical to so hold in view of the construction already given the act by this court.

In other words, since it has been held that the primary purpose and effect of the act of 1911 was to repeal and amend the civil code, it could repeal no provision outside of the code except by express reference. In Lewis' Sutherlands Statutory Construction these general rules are stated concerning repeals by implication:

"If, by fair and reasonable interpretation, acts which are seemingly incompatable or contradictory may be enforced and made to operate in harmony and without absurdity, both will be upheld, and the later one will not be regarded as repealing the others by construction or intendment. As laws are presumed to be passed with deliberation and with a full knowledge of all existing ones on the same subject, it is but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any former law relating to the same matter, unless the repugnancy between the two is irreconcilable. In the endeavor to harmonize statutes seemingly incompatable, to avoid repeal

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by implication, a court will reject absurdity as not enacted, and accept with favorable consideration what is reasonable and convenient. * * * The act being silent as to repeal and affirmative, it will not be held to abrogate any prior law which can reasonably and justly operate without antagonism. * * * 'It is a reasonable presumption that all laws are passed with a knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring.'" Vol. 1, 2nd ed., sec. 267.

Thus it will be observed with what high degree of disfavor repeals by implication are regarded. An application of these rules to the present case can result in no other conclusion than that no repeal of Section 2123, *supra,* in so far as it relates to writs of error in divorce proceedings, has been effected.

Considering the question from a standpoint of repugnancy, the terms and necessary operation of the earlier statute can be readily harmonized with those of the later act. Plainly there is no necessary contradiction between the affirmative provision of the divorce act, that a writ of error to review a decree in such proceedings shall be sued out within six months from the date of the decree and not after that time, and of the new act, that writs of error shall not be sued out after three years from the making and entering of the judgment or decree of which complaint is made. There is a general principle, supported by numerous authorities, that a statute without negative words will not repeal existing statutes unless there is an unavoidable repugnancy. 1 Lewis' Sutherlands Statutory Construction, sec. 258. The language of the provisions under consideration is affirmative. The earlier one treats of writs of error in divorce proceedings and operates in such cases only, while the later treats of writs of error in general and

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operates in cases where there is no special, inconsistent provision. Courts should be reluctant to sanction the repeal of the existing legislative enactment unless it clearly appears by the terms or operation of the later pronouncement that it was the unmistakable intention of the legislature to accomplish that end, and this is especially true where, as here, the earlier act is founded in experience and grave considerations of public welfare. In cases of this sort the intention of the legislature should prevail over a literal interpretation. (*Hogg v. Board of Com'rs of San Miguel County,* (57 Colo. 463.) 141 Pac. 478.

It is further contended by plaintiff in error that, in any event, the filing in the Court of Appeals of the petition to remand the case constituted a general appearance by which the right to invoke the six-month limitation of Section 2123, *supra,* was waived. This contention is evidently urged upon the erroneous presumption, since the cases cited in support of it so indicate, that the question is a jurisdictional one. Such is not the fact. This statute is one of limitation, affording purely defensive matter, and was properly and in apt time raised by the motion to dismiss.—*Rudolph v. Rudolph,* 50 Colo. 243, 114 Pac. 977.

The remaining contention of plaintiff in error relates to alleged error committed in amending the decree of divorce. It is sufficient to say in this connection that the record affirmatively shows that the judgment or decree of divorce was allowed and rendered on December 6, 1910, and by its express terms became effective ten days thereafter. The matter of its formal entry was purely clerical, or ministerial, and whenever done in conformity with the affirmative showing of the record related back to the date of actual rendition.

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The writ of error is, therefore, dismissed at the cost of plaintiff in error.

Decision *en banc*.

[No. 7829.]

COLORADO CAPITAL COAL MINING COMPANY v. CHATFIELD.

1. NEGLIGENCE—*Not Contributing to the Injury*, is not actionable, e. g. the failure of the proprietor of a coal mine to provide the metal tube prescribed by Rev. Stat. Sec. 640, where this omission had nothing to do with the injury complained of. (165)

2. INSTRUCTIONS—*As to Collateral Matter not in Issue*, tending to mislead and confuse the jury, disapproved. (165)

Error to Boulder District Court.—Hon. HARRY P. GAMBLE, Judge.

Mr. WILLIAM E. HUTTON, for plaintiff in error.

Neil Chatfield while employed in a mine of the Colorado Capitol Coal Mining Company as a cager, was injured, from the effects of which he died. His wife brought suit against the company to recover damages. Judgment was rendered in her favor for the sum of five thousand dollars, to review which the company has brought the case here on error. The complaint contained two counts. The first was based upon alleged negligence of the company, and the second upon the alleged negligence of its employes, who were fellow servants of the deceased.

The evidence discloses that a shaft about two hun-

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dred feet deep connected the underground workings with the surface. The shaft had two compartments, in each of which a cage was operated by means of a cable. The cages were so arranged that when one was at the tipple of the mine, the other would be at the bottom of the shaft, and when one ascended the other descended. Coal was removed from the mine in loaded cars, hauled from the workings, and placed upon the cage. The deceased, at the time of his injury, and for some three months prior, had been employed as a cager. His chief duty was to place loaded cars upon the cage, to be hoisted through the shaft, and receive the empty cars returned by the cage and distribute them to the drivers. He usually worked south of the shaft, and the other cager, Boyd, north of the shaft. Occasionally he would go to the north side to assist Boyd in pushing the empty cars off the diamond or track, there being a slight grade on that side. Shortly before his injury he had helped Boyd with an empty car, and had started to go back to the south side by way of the shaft, and through the cage on his side. Before he got off that cage it was raised by the engineer and Chatfield was caught between it and the timbers of the roof of the entry, and received the injuries which caused his death.

Section 644 Revised Statutes 1908, provides, "* * * and there shall be cut, in the side of every hoisting shaft, at the bottom thereof, a traveling-way, sufficiently high and wide to enable persons to pass the shaft, in going from one side of the mine to the other, without passing over or under the cage or hoisting apparatus." The defendant company had complied with this statute by constructing a man-way on one side of the shaft. It appears that this passage was somewhat sloppy, that water was trickling down, and would fall on a person passing through, but a board had been placed so that

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an employe could walk through without getting his feet wet. The compay had posted rules, one of which was as follows: "No cage will be hoisted without knowledge of men at bottom, but men must not cross over cage when on bottom, for fear it may be moved for some cause not known to them." The signal bells were so arranged that the cager would signal the weigh boss at the top, who would then signal the engineer to hoist. The engineer could also hear the bell from the bottom, but would not hoist until signaled by the weigh boss. It appears that the engineer did not hear any signal from the bottom to hoist the cage which injured Chatfield, but started to hoist on a signal from the weigh boss. The latter testified that he thought he heard a bell from the bottom when he signaled the engineer, but it is probable that he was mistaken about receiving such signal.

There was also evidence that on the day of the injury the signal bells were in working order, although about one week prior to that they had not been. Section 640 of the statutes, *supra,* provides, "In all cases where the human voice cannot be distinctly heard the owner or agent shall provide and maintain a metal tube from the top to the bottom of the slope or shaft, or a telephone connection suitably adapted to the free passage of sound, through which conversation may be held between persons at the bottom and at the top of the shaft or slope; also the ordinary means of signaling to and from the top and bottom of the shaft or slope * * *" Over the objection of defendant the plaintiff was permitted to show that the mine was not equipped with either of these appliances.

The court instructed the jury to the effect that if they found from the evidence that the defendant, in the exercise of ordinary care for the protection of its cagers at the bottom of the shaft, should have provided a speak-

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ing tube or a telephone from the top to the bottom of the shaft, through which conversation could be held, or some method of return signal, by which inquiry could be made of the cagers in the bottom of the shaft whether they were ready to have the cage hoisted, or by which, when the engineer was in doubt whether a signal had been given or not, inquiry could have been made from the top, and that the defendant failed to furnish these appliances, and did not exercise ordinary care in that respect; then in that event, they would be justified in finding that defendant was guilty of negligence. To this instruction the defendant objected and excepted, and requested the court to instruct the jury that the plaintiff was not entitled to recover any damages on account of the fact that the defendant did not provide or maintain a metal or any tube, from the top to the bottom of the shaft through which conversation could be held, which was refused.

Numerous errors are assigned upon other matters which we shall not mention or pass upon in view of the fact that plaintiff has not seen fit to give the court any aid by filing a brief, and we shall confine our decision to the propositions urged by defendant, which are: that the court erred in permitting plaintiff to show that the mine was not equipped with a speaking tube or telephone; in giving the instructions above noted regarding these appliances, and in refusing to instruct the jury that damages could not be predicated on this failure.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The most that can be claimed for the testimony on the part of plaintiff is that it was for the jury to determine whether negligence on the part of the company or its employees, or the negligence of the deceased in passing through the shaft and over the cage instead of the man-way, was the proximate cause of his injury.

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It is clear that the failure of the defendant to equip its mine with a speaking tube or telephone connection in no manner contributed to the injury of deceased. It does not appear that either of these appliances were necessary or were ordinarily used for signaling the engineer to hoist the cage. Bells were provided for this purpose and in working order. Failure on the part of the company to comply with the statute relating to speaking tubes and telephone connections, was negligence, but not actionable, when it appears that it did not cause or contribute to the injury of deceased.—*Kent Mfg. Co. v. Zimmerman,* 48 Colo. 388, 10 Pac. 187; *Elkton Cons. G. M. & N. Co. v. Sullivan,* 41 Colo. 241, 92 Pac. 679.

In determining the vital question in the case the testimony relating to such negligence was in no sense pertinent, and its admission and the instruction of the court upon the subject presented a collateral matter which tended to confuse and mislead the jury, instead of informing them upon the issue they were to consider and determine.—*Denver Tramway Co. v. Cowan,* 51 Colo. 64.

The judgment of the District Court is reversed and the cause remanded for a new trial.

Judgment reversed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

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[No. 8068.]

DEEBLE ET AL. v. ALERTON.

1. HUSBAND AND WIFE—*Separation Agreement*, does not deprive the wife of her right to the separate allowance provided by Rev. Stat. Sec. 7223, where such agreement contains no express renunciation thereof. (170)

The right of the widow cannot be taken away by presumption or construction. (171)

Semble, a common law marriage entitles the widow to the allowance. (169)

2. EXECUTOR—*Power of the Court to Refuse Letters Testamentary.* The law is a jealous guardian of the estates of deceased persons, and when the appointment of the executor named in the will of the decedent may endanger the estate, or lead to embarassment in the administration, it is within the power of the court, and is its clear duty, to commit administration to another, e. g. where the executrix is bitterly hostile to the insane widow, and the estate is hardly of sufficient value to discharge the widow's allowance, and pay the debts of the deceased the appointment, as administrator, of the conservator of the insane widow, a man of high character, and a long-time friend of the parties, approved, as warranted by Rev. Stat. 7111. (171, 172)

Error to Montrose District Court.—Hon. THOS. J. BLACK, Judge.

Messrs. CATLIN & BLAKE, for plaintiff in error.

Messrs. FINK & WOOD, and Mr. WALTER P. CROSE, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Henry Alerton of the county of Montrose, in this state, and Lizzie Alerton, had lived together as man and wife for a period of more than thirty years, after which time and on the 19th day of January, 1904, they entered into an agreement that each should live separate and

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apart from the other, which agreement provided for the division of their property, and the property was divided accordingly.

After describing the property so divided, the agreement recites: "And in pursuance of this agreement it is further mutually agreed that said parties may live separately and apart from each other and reside in such place or places, family or families, and with such relations, friends or other persons, and to follow and carry on such trade or business as he or she may from time to time choose or think fit; that neither will at any time compel the other to live with him or her, or molest disturb or trouble the other for living separately and apart, nor sue, molest or trouble any other person whatsoever for receiving, entertaining or harboring each other; and except as hereinabove neither party shall or will at any time hereafter claim or demand from the other any money, jewels, plate, clothing, household goods, furniture or stock in trade, or any property whatever, which either now hath or may hereafter procure, or which may be devised or otherwise acquired by either." It was further agreed: "That each shall from and after this agreement pursue their own course and business, as though not married, and that neither shall be liable for the support or maintenance or debts of the other."

About one year after the execution of the agreement and division of property, Alerton executed his will in which and after reciting the said agreement, as to the separation and division of the property, and that he had no children of his own, he bequeathed all his property to the children of one George Reading, deceased, and appointed Sarah E. Reading, widow of the deceased George Reading, as executrix of his will, and directed that no bond be required from her as executrix. On November 3, 1912, Alerton died, and upon application, John Deeble

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was appointed and duly qualified as administrator of his estate. Later, and on the 21st day of November, 1912, there was filed with the county court of Montrose county, the will of Alerton and a petition for probate. Appraisers of the estate were appointed under the proceedings in administration, and on the 9th day of December, a report of these appraisers was filed reciting specific property, and the value thereof, described as property allowed by law to the widow for herself and family, in the aggregate of $2,000. The record discloses that at the time of the appointment of Deeble as administrator, Lizzie Alerton had been adjudged insane, and that the said Deeble had been appointed conservator of her estate.

On the 10th day of December, 1912, Deeble as conservator of the estate of Lizzie Alerton, and certain creditors of Alerton, filed their joint protest against the appointment of Sarah E. Reading as executrix of the will, and asking that Deeble be continued as administrator. The basis of the protest and petition was, that Sarah E. Reading was unfit and incompetent to administer the estate of the deceased, and that she is hostile to the interests of Lizzie Alerton, insane, widow of the deceased Henry Alerton. The validity of the will does not seem to be questioned.

On the 20th day of December, there was filed a petition upon the part of Lizzie Alerton, insane, by Deeble, as conservator of her estate, claiming a widow's allowance in the said sum of $2,000. Upon the hearing the County Court denied the protest, admitted the will to probate and confirmed the appointment of Sarah E. Reading as executrix, but ordered that she give a bond for the faithful performance of her duties as such executrix, in the sum of $5,000, and found that the article of separation is binding upon the parties, and that Mrs.

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Lizzie Alerton has nothing in the estate, at this time, as widow. Plaintiff in error appealed to the District Court and there the judgment of the County Court was affirmed.

The refusal of the court to allow the protest, or to continue Deeble as administrator, and the action of the court in refusing to grant the petition for a widow's allowance, are questions raised in this controversy.

It appears probable, that no marriage ceremony was ever solemnized as between Henry and Lizzie Alerton, but that they had lived together and were recognized as husband and wife for many years, and that Alerton so considered her, both in the separation agreement, and in the recitation in his will. The parties were never divorced. But there was a marriage certificate introduced in evidence showing the marriage of Alerton to Sarah E. Reading, the executrix of the will, in 1907. But the testimony shows that Alerton made his home at least, at the same house with Lizzie Alerton, up to the time of his death.

The court and counsel seem to have treated the marriage to Mrs. Sarah E. Reading as a nullity, and Lizzie Alerton as having been the wife of Henry Alerton at the time of his death. The learned judge in his written opinion speaks of these matters in the following language:

"This case is decided wholly upon what to the mind of the court the separation agreement shows on its face, and the will and subsequent marriage of Henry Alerton are mentioned as matters of corroboration. It is therefore considered and adjudged by the court that by reason of said separation agreement Lizzie Alerton has no interest in the estate of Henry Alerton, deceased, and that she is not entitled to a widow's allowance."

Upon the question, whether in view of the agreement of separation and division of the property, the

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widow, Lizzie Alerton is entitled to a widow's allowance, there appears to be a division of opinion in this regard among the authorities, yet the question seems to be settled in this jurisdiction in favor of such allowance. In the case of *Wilson v. Wilson,* 55 Colo. 70, 132 Pac. 67, Mr. Justice Bailey entered into a very careful examination of our statutes, and the authorities generally upon this subject. While that case involved an anti-nuptial agreement, yet the principle there involved is not different from that of the case at bar. It will be noted that in the agreement in this case, there is no specific waiver of the right of Lizzie Alerton to claim a widow's allowance. In the case just cited it was held by this court that the widow's allowance is not a distributive part of the estate, and is nothing more nor less than a part of the costs of administration.

It is not contended in this case that Lizzie Alerton was not the lawful wife of Henry Alerton at the time of his death. At his death she then became his widow with all rights as such, provided by the statutes. The question of her right as a widow to inherit is not involved in this proceeding and therefore not determined.

It was said in the case of *Wilson v. Wilson, supra,* "Under all of the decisions of the courts which we have been able to find, a widow's allowance is not in the nature of an interest in an estate, it is not something which goes to the widow by descent; it is a preferred claim against the estate. This is well declared in the case of *Claypool v. Jaqua,* 135 Ind. 499, 35 N. E. 285. Upon a consideration of section 7206 R. S. 1908, which reads as follows: 'Third. All allowances to the widow, wife or orphans made as provided by law shall compose the third class.' It is noted that the allowance to the widow by express statutory provision is made a preferred claim against the estate, just as in the Indiana

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case. This allowance is no part of the distributive share of the estate, but is rather, in a very just and proper sense, a charge or claim against the estate. It is, indeed, nothing more or less than a part of the costs of administration."

The divinely inspired and divinely commanded institution of marriage has ever had the favor of the law. The law has constantly before it this sacred relationship upon which rests primarily the home, society, country, and the cause of humanity. The law curbs the will of and prescribes a limit to bequests of testators where such relationship exists. The "widow's allowance," provided by our statute, is a gracious and deserved tribute of the law to wifehood. It is a first charge upon estates, and so made to provide for the comfort and sustenance of the widow and children, pending administration and before distribution. It therefore cannot be a part of that which is to be distributed. It is designed not only as a protection for the widow and children as against want or humiliation, but a protection for the State as well. It is a right that cannot be waived by presumption, assumption or construction. If it may be waived at all, it must be in terms that do not admit of doubt. In the absence of such a waiver, where the relationship of widow exists, the right is corresponding.

In the matter of confirming the appointment of Mrs. Reading as executrix, and discharging Deeble as administrator, it appears that Mrs. Reading can have no interest in the estate under the will or otherwise, and that from the circumstances of her relationship with Alerton in his life-time, together with the express proof of her antagonism toward Lizzie Alerton, the insane widow, she ought not in fairness and justice be continued as executrix. Particularly so when we consider the further fact that the estate appears not to be of sufficient value

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to pay its indebtedness, including the widow's allowance, and that for such reason, there is scarcely a possibility that any property will remain for distribution, either under the terms of the will or otherwise. Further, it appears that Deeble is a man of high character and a long-time friend of Alerton and his wife. Under these circumstances it would seem to have been the duty of the court under its statutory power, Sec. 7111 Rev. Stat. 1908, to have allowed the protest and to have continued Deeble as administrator of the estate.

It is the policy of courts in so far as it may be within the limits of the law, and consistent with the interests of the estate, to carry out the expressed will of the testator. But a testator cannot foresee all circumstances and conditions that may afterward arise, and when such do arise as appear to endanger the estate of the deceased or to prevent its proper administration, it is the clear duty of the court, and within its undoubted power, to grant the necessary and proper protection. The law is a jealous guardian of the estates of deceased persons in the matter of their administration. To this end it had conferred upon courts of probate vast powers and wide discretion, though at the same time it has provided the almost unlimited right of review by appellate courts of the acts, conduct, orders and decisions of these courts in such matters.

As before stated, the question of distribution under the will is not before us.

The judgment is reversed with instructions to the court to enter a judgment in harmony with the views herein expressed.

MUSSER, C. J. and GARRIGUES, J., concurring.

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[No. 8072.]

MacFaddin v. Bice.

1. Appeals and Error—*Abstract.* Where the abstract is so defective as to afford no comprehensive idea of what is in controversy the court may decline to review the judgment. (173)

2. Statute of Limitations—*Evidence.* Evidence of a claim barred by the Statute of Limitations held properly excluded. (174)

Error to Denver District Court.—Hon. John A. Perry, Judge.

Mr. John Barnd, for plaintiff in error.

Mr. Jos. N. Baxter, for defendant in error.

Mr. Justice Garrigues delivered the opinion of the court:

This action was brought by defendant in error, hereinafter called plaintiff, against plaintiff in error, defendant below, to recover an amount alleged to be due as attorney's fees for legal services. There was a jury trial and plaintiff recovered judgment for $513.00, to review which, defendant brings the case here on error.

The abstract of the record does not give the complaint in full or in substance, and while it contains the answer, it is not at all clear what is involved in the case. Only a small part of the evidence is abstracted, and five of the court's instructions are set out; as to whether or not these were all of the instructions, we are not advised. From this meager abstract it is impossible to obtain a comprehensive idea of the case, and we might for that reason decline to review it. But inasmuch as the parties argue what seems to them to be the principal error upon which defendant relies, we will express our views thereon.

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We gather from the argument that defendant on the trial endeavored to sustain a counter-claim by offering evidence which was excluded for the reason that the cause of action set out in the cross complaint was barred by the statute of limitations. The allegation of the answer in this respect, is as follows:

"Further answering said amended complaint defendant says that from November, 1910 to 1905 a period of thirty-nine months, plaintiff occupied premises belonging to defendant for which he agreed to pay ten dollars per month."

Referring to the abstracted evidence of plaintiff on cross examination, which is all that is presented to us bearing upon the subject of the time of the running of the statute of limitations, upon which we assume defendant relies, we find Mr. Bice left defendant's premises in December, 1904, eight years before filing the present case. Defendant's counsel admitted in answer to a question by the court that Mr. Bice was correct in this statement, but made the claim that the transactions between the parties constituted an open, running account. The abstracted testimony presented does not sustain this contention. We are of the opinion that the ruling of the court in rejecting evidence relative to room rent in 1904 and prior thereto, was correct.

Defendant assigns error on the giving of instructions 2 to 5 inclusive by the court, but these assignments are not argued, and we are not prepared to say upon an inspection of the record presented, that there was any prejudicial error committed by the court in this respect.

The judgment is affirmed.

Affirmed.

Chief Justice Musser and Mr. Justice Scott concur.

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[No. 8129.]

JABICH v. THE PEOPLE.

1. CRIMINAL LAW—*Change of Venue.* Information for wilful murder. More than 90 percent of the population of the county subject to jury duty resided in, and in the vicinity of, the mining town in which the homicide was committed. There was a strong prejudice in that community against men of the nativity of the accused. Immediately after the homicide a mob pursued the accused, threatening to lynch him, and the sheriff had thought it necessary to remove him to another county for safe keeping. Newspapers had published untruthful and inflammatory accounts, highly prejudicial to the accused *Held* that a change of the venue should, in the exercise of a sound discretion, have been allowed. (178)

2. ——*Renewal of Motion, after Conviction Reversed,* must be upon a new showing, of the conditions then existing. (178)

3. ——*Homicide by Mis-adventure—Elements. To establish this* defense it must appear (1) That the accused was engaged in a lawful act. (2) That he was not guilty of any want of due care in the act causing the death. (3) That the homicide was accidental and not intentional. (179)

4. ——*Instructions.* No matter how unreasonable or improbable the defense asserted, the accused is entitled to an appropriate instruction upon the hypothesis that it may be true. (179)

Where, upon the trial of an information for murder the defense is that the accused was lawfully defending himself against an assault, and during the encounter the deceased was accidentally killed, the court should instruct upon the law of self-defense in connection with the law defining death by misadventure, because the question whether the accused was lawfully exercising the right of self-defense is involved in the defense of homicide by accident. *Nilan v. People* 27 Colo. 206 explained. (179, 181)

5. ——*Forms of Verdict—Duty of Counsel.* By custom and usage in this jurisdiction, it is the practice of the court of its own motion to have prepared and sent out to the jury, forms covering every possible verdict that may be returned. In a trial of an information for wilful murder, where counsel was, or should, by proper attention, have been aware of an omission to send to the jury a form of verdict covering manslaughter, and failed to request such a form, a conviction of first degree murder will not be reversed on this ground.* (182)

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6. ——*Homicide—Implied Malice—For the Jury.* In the trial of an information for murder the jury should not be instructed that where no considerable provocation appears or the circumstances show an abandoned and malignant heart the law implies malice, and it is not necessary that they should determine the question. The court should direct the attention of the jury to the statute (Rev. Stat. Sec. 1624), and they should be left to draw the inference of malice. (181)

*Syllabus by GARRIGUES, J.

Error to Lake District Court.—Hon. CHARLES CAVENDER, Judge.

Mr. JAMES T. HOGAN, for plaintiff in error.

Hon. FRED FARRAR, Attorney General and Mr. CLEMENT F. CROWLEY, Assistant Attorney General, for The People.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

June 11, 1913, plaintiff in error was convicted of murder of the first degree for killing James Cleary on February 27, 1913. They were miners, and the homicide occurred in the shafthouse of a mine at Leadville, death resulting from two wounds inflicted with a miner's candle-stick, one on the breast, the other in the back. Prior to his employment at the mine, defendant had purchased a candle-stick on which he filed his initial and before the killing had traded it to one Lute Kellog. The morning of the homicide, the men met, friendly, with other miners in the dry-room, preparatory to going down the shaft. Some conversation occurred between deceased and defendant, at the time, in which each claimed a candle-stick, and defendant told deceased if he would go with him, he would show him the candle-stick in

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question, upon which would be found his initial. Both went from the dry-room to the shaft to go down the mine. While they were standing at the collar of the shaft waiting for the cage, Lute Kellog came by, was informed of the dispute, and on being asked to let deceased examine the candle-stick, handed it to him, entered the cage and went down, leaving them at the surface. As soon as deceased obtained possession of the candle-stick, he claimed it was his; defendant also claimed it, calling Cleary's attention to the initial. At this time deceased attempted to pass the candle-stick to his partner, who had appeared on the scene, whereupon defendant pulled it out of deceased's hand, and turned around to go down the shaft, when deceased struck him a blow with his fist back of and below the ear, which knocked him down and against the cross bar of the shaft. From the people's evidence it appears that deceased was holding the candle-stick by the sharp end, and defendant pulled it out of his hand and turned facing the shaft; that deceased then struck him in the back of the head with his fist and knocked him over onto the cross-bar, and he would have fallen down the shaft had it not been for this bar; that when defendant got up, they grappled, a struggle ensued, and defendant stabbed deceased in the back with the candle-stick after he had declined further combat, and was retreating. From defendant's evidence it appears that after he had been knocked down against the cross-bar, he arose in a dazed condition, when he was struck in the back by some person which caused him to fall against deceased; that they then clenched and struggled in this position until defendant broke loose and ran away. As to what happened during and immediately after the affray, the evidence is conflicting.

Defendant was from southeastern Europe, while deceased and his friends were from northern Europe. De-

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fendant testified that during the encounter the friends of deceased showed hostility towards him, in both words and actions, and that he feared they would kill him and throw him down the shaft; that he participated in the struggle after being knocked down, in self-defense, and broke loose and ran away from fear of being killed, without any knowledge that deceased was wounded, and, if he stabbed him with the candle-stick, it was unintentional and without his knowledge.

1. The defendant filed an application for a change of venue, which the court overruled. From the evidence in support of this application, it appears that over ninety per cent of the population of Lake county, subject to jury duty, reside in and immediately around Leadville, and that the newspapers there published articles which were untruthful, inflammable, and highly prejudicial to the defendant who was a Montenegrin, and practically alone. The evidence shows there was in the camp at the time, strong prejudice against laborers from southeastern Europe. Excitement ran so high after the killing that defendant was pursued by a mob which threatened to lynch him, and he was removed by the sheriff to Chaffee county for safe keeping. The case was tried shortly after the homicide, and from the record we feel that the court in the exercise of its sound discretion should have changed the venue in order to insure a fair and impartial trial. Such conditions may not be present at the time of another hearing, if one be had, and we do not wish to be understood to hold that the court should grant a change of venue upon the showing now under consideration. Should the motion be renewed, it would have to be determined upon existing, and not past conditions.

2. The court refused to give any instructions regarding the law of self-defense for the reason, as it appears, that such defense admits the killing was inten-

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tional, but that it was necessary in order to save the life of defendant, or prevent his receiving great bodily harm, and in as much as this defense was not interposed, it would be improper to instruct upon the law applicable thereto, there being nothing in the case calling for it, or upon which to predicate such an instruction; that under the doctrine announced in *Nilan v. People,* 27 Colo. 206, 60 Pac. 485, and *Wiley v. People,* 51 Colo. 574, 119 Pac. 620, it would be error to submit to the jury the law of self-defense. This is not the question. Self-defense was not interposed as a defense. The proposition is, was there any principle involved in the case calling for an appropriate instruction upon the law of self-defense, not as a defense, but upon the theory that defendant was engaged in doing a lawful act; if there is, it was error to refuse to give such an instruction. The theory of the defendant was, that he was standing with a miner's candle-stick in his hand, in a place where he had a right to be, with no thought or intention of injuring anyone; that he was assaulted and while defending himself, he may have accidentally stuck deceased with it, but that if he did, he had no knowledge of doing so. No matter how improbable or unreasonable the contention, defendant was entitled to an appropriate instruction upon the hypothesis that it might be true. Excusable homicide by misadventure, not self-defense, was the theory upon which defendant relied. Three elements enter into this defense, it must appear first, that the person killing, was engaged in a lawful act; second, that he was free from carelessness; and third, that he did not intend to, but accidentally killed another. If any of these is lacking, the plea is unavailing. For the purpose of showing he was engaged in the lawful act of self-defense, defendant claims he had been assaulted. If the homicide occurred while he was engaged in an unlawful act, misad-

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venture is eliminated as a defense. As his right to assert the defense of misadventure depended upon his being engaged in a lawful act, so whether he was engaged in a lawful act or not, depended upon the principles of self-defense. If there was an encounter in which there was no claim that the killing was done in self-defense, and no such defense was interposed, but defendant claimed he was assaulted and was lawfully defending himself, and during the encounter the deceased was accidentally killed, the court should have instructed in connection with the law of misadventure, upon the law of self-defense; not because it was interposed and relied upon as a defense, but to aid the jury in determining whether the killing was accidental while defendant was engaged in doing a lawful act. In determining this question the principles of self-defense were involved.—*Ryan v. State,* 115 Wis. 488, 92 N. W. 271; *Prinder v. State,* 27 Fla. 370, 8 So. 837, 26 Am. St. 75.

We think the court misconceived the doctrine intended to be announced in the Nilan case. It holds that the true character of the defense presented should be submitted to the jury, and no instructions should be given based on a defense not interposed; that where no defense is predicated on self defense, there is no need of submitting it as a defense, and in some cases it might be prejudicial error to do so. It is evident from the entire opinion in the Nilan case that the statement: "We go further and say if defendant had asked instructions on the law of 'self-defense,' they should have been refused, because there was no evidence on which to predicate them." (27 Colo., 211), means if instructions had been asked upon the law of self-defense, as a defense, they should have been refused for the reason there was no evidence upon which to predicate such instructions. But it does not follow where defendant claims he

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rightfully had possession of a miner's candle-stick; was standing where he had a right to be; was assaulted, knocked down, and in the struggle following while he was in a dazed condition and defending himself may have accidentally stuck his assailant with the candle-stick, causing death, but with no intention of doing so, and did not know when or how the injury was inflicted; that the court should refuse, in connection with an instruction on misadventure, to give an appropriate instruction upon the principles of self-defense, not because such a defense was relied upon, but for the purpose of enabling the jury to determine whether the defendant was doing a lawful act.

3. The court instructed the jury: "In certain cases however, the law implies malice as when no considerable provocation appears, or when all circumstances of the killing show an abandoned and malignant heart. If, therefore, you find from the evidence in this case that there was no considerable provocation at the time of the killing, or that the defendant acted with an abandoned and malignant heart, then in that event the law will imply malice and it will not be necessary for you to determine the question of malice." That part of the instruction telling the jury that in certain cases the law will imply malice and they need not determine that question, is wrong, and should have been omitted. True, the statute provides in what cases malice shall be implied, but the court should call the jury's attention to the statute and they should make the implication. Instead of telling them that in certain cases malice is a question of law and it will not be necessary for them to determine it, they should be told in what cases the statute says malice shall be implied, and left to make or draw the inference of malice for themselves as a logical deduction from the evidence.—*Kent v. People,* 8 Colo. 563, 9 Pac, 852.

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4. The court, to aid the jury after they arrived at a verdict, of its own motion sent with them into the jury room all possible forms of verdict which they could return, excepting for manslaughter, which was omitted. Complaint is made that this was an intimation from the court that it had eliminated manslaughter from the case. One of the issues was whether the killing was by misadventure or felonious, and if felonious whether there was sufficient provocation or mitigation to reduce the killing to manslaughter, and appropriate forms of verdict on this issue should have been furnished the jury. By custom and usage in this jurisdiction, it is the practice for the court of its own motion to prepare or have prepared and submitted to the jury proper forms upon every possible verdict that might be returned. There was evidence of the people that the killing occurred during an affray, and had the defendant introduced no evidence, it was the duty of the court to have submitted verdicts upon manslaughter, on the theory that the jury could and might return such a verdict. Counsel for the defendant, had he properly watched the progress of the trial, must have known that no such verdict was sent to the jury room, and it was his duty to request the court to submit such a form. But because counsel for defendant did not request it, and because the jury found the defendant guilty of a grade higher than the grade above manslaughter, we are not prepared to reverse and remand the case on this account. Upon another trial the court should see that proper forms of verdict are furnished the jury.

5. The court told the jury that murder of the second degree means the *wrongful* killing of a human being with malice, but without deliberation and premeditation. Complaint is made of the use of the word "wrongful" instead of "unlawful." Unlawful as used in the statutory definition of murder, means without legal excuse or

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just cause; that is, without justification or excuse. In this sense, it is not equivalent to wrongful. That the killing was without excuse or justification, that is, unlawful, carries with it a moral turpitude not conveyed by the word wrongful, which, in its ordinary sense means injurious, heedless, reckless, unjust unfair. Murder under our statute, as at common law, is defined as the unlawful killing of a human being with malice, and it is better in giving instructions not to experiment by substituting the word wrongful.

The case is reversed and remanded.

Reversed.

Decision *en banc.*

[No. 8191.]

FORT COLLINS MILLING & ELEVATOR COMPANY ET AL. v. LARIMER & WELD IRRIGATION COMPANY.

WATER RIGHTS—*Irrigation—Change of Point of Diversion—Review of Decree.* Under c. 6 of the Laws of 1911, a decree allowing a change in the point of diversion of water is to be reviewed by writ of error.

Error to Larimer District Court.—Hon. NEIL F. GRAHAM, Judge.

Mr. H. N. HAYNES, Mr. F. J. ANNIS and Mr. J. C. EWING, for plaintiffs in error.

Mr. L. R. RHODES, for defendant in error.

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On motion to dismiss writ of error.

Defendant in error under the provisions of sections 3226, 3231, Revised Statutes 1908, filed a petition in the court below for a change of the point of diversion of the Chamberlain ditch. Plaintiffs in error filed objections to the proposed change. December 4, 1912, the court entered a decree permitting the change as prayed, and the objectors or respondents, have brought the proceedings here for review on error. Defendant in error moves to dismiss upon the ground, among others, that the only method by which the judgment or decree in such proceedings can be reviewed is by appeal, as provided in section 3231 *supra,* and the statutory provisions referred to in that section.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Chapter 6, Session Laws 1911, entitled "An Act in Relation to Appeals and Writs of Error," abolished appeals in proceedings of the character under consideration, and provided that decrees therein were reviewable on error.—*Harrington v. Harrington, ante* 155 decided at this term; *Dennis v. The People,* 55 Colo. 120, 133 Pac. 741; Session Laws, 1911—268, sec. 4. That is all we determine in passing on the motion to dismiss. All other questions raised by the motion may be presented on final hearing. The motion to dismiss is denied.

Motion denied.

Decision *en banc.*

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[No. 7530.]

South Platte Ditch Company et al. v. Larimer and Weld Reservoir Company.

Judgment reversed on the authority of *Comstock v. Larimer & Weld Company* No. 7582, *post*, 186.

Error to Larimer District Court.—Hon. Harry P. Gamble, Judge.

Messrs. Allen & Webster, for plaintiffs in error.

Mr. L. R. Rhodes, Mr. R. W. Fleming, for defendant in error.

Mr. Justice Bailey delivered the opinion of the court:

The action was brought by the defendant in error against the State Engineer and other water officials, in which plaintiffs in error, direct irrigators in Water District No. 64 of Division No. 1, were afterward made defendants. The complaint is the same as that in cause No. 7582, Charles W. Comstock, State Engineer et al., plaintiffs in error, v. The Larimer and Weld Reservoir Company, defendant in error, 145 Pac. 700 decided at the present term of this court. A general and special demurrer by plaintiffs in error to the complaint was overruled. They elected to stand upon the demurrer, and a decree, as prayed, was rendered by the court against them with costs, and they bring the case here for review. The complaint in the case cited was held obnoxious to a like attack, and the reasons there given are controlling here. Therefore, upon the authority of that decision,

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the judgment is reversed and the cause remanded with directions to dismiss the complaint.

Reversed and remanded.

Decision *en banc.*

Mr. JUSTICE GARRIGUES dissents.
Mr. JUSTICE HILL not participating.

[No. 7582.]

COMSTOCK, STATE ENGINEER, ET AL. v. LARIMER & WELD RESERVOIR COMPANY.

1. PLEADINGS—*Construed.* The complaint, of a reservoir company, filed in October, set forth that plaintiff was entitled by certain adjudication decrees to divert water from the Cache la Poudre River, in Water District No. 3, for storage; that large volumes of water were passing the head-gate of its inlet canal; that the water was not needed for direct irrigation, either in District No. 3 or elsewhere; but that the official defendants, the State Engineer, the Division Engineer, and the Water Commissioner, under an order of the Division Engineer promulgated in the preceding May and reiterated on the first of September, were refusing to permit plaintiff to divert water from the stream for storage; that in Water District No. 3, for more than twenty years, the use of water for direct irrigation terminated about the 15th of September in each year, and all rights of appropriators for any purpose other than storage ceased and determined at the date named, until the following April; that the acts of the defendants were unlawful, unwarranted, and in violation of plaintiff's decreed rights; that the order complained of was uncalled for, and an assumption on the part of defendant officials, of an authority not conferred upon them by law, and that the use of water contemplated by the order would be mere waste, and contrary to law; praying an injunction to restrain these officials from enforcing the order in question, and for a decree that in Water District No. 3 the period for direct irrigation commences upon April 15th in each year, and extends to September 15th, and the period for storage of water commences on

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the 15th of September in each year, extending to April 15th of the following year. *Held* that the object of the action was to obtain the relief demanded by the special prayer, and not to suppress waste or promote economy in the use of water. *Held* further that the complaint failed to show, by any averment of fact that the water officials were acting beyond or contrary to the authority conferred upon them by law, or that the plaintiffs had any right superior to that of the appropriators for direct irrigation, in the same district. (189, 190, 192, 197, 205)

2. ——*Complaint in Controversies as to the Use of Water.* Where one claiming the right to water for storage seeks to restrain its application to direct irrigation it is not sufficient to aver merely an appropriation for storage, and a decree establishing the right. The complaint must go further and show that the plaintiff's right is relatively prior to that asserted by those against whom the relief is sought. (197)

3. PARTIES—*In Equity—Indispensable.* Plaintiff claiming to be entitled to the waters of a certain stream, for storage, between certain dates, brought an action to restrain the officials of the water service from enforcing an order of the Division Engineer which required the Water Commissioner of the district to cease the storing of water, during the same period. *Held* that the appropriators for direct irrigation in other districts of the division would, of necessity, be affected by the decree and were indispensable parties. (193, 194)

4. IRRIGATION—*Irrigating and Non-Irrigating Seasons.* The division of the year into two distinct seasons, during one of which the waters of a certain district are to be used for direct irrigation, and during the other of which they are to be stored, is in conflict with statutory provisions regulating the distribution of water, and with the thoroughly established doctrine that preference to the use of water depends upon prior appropriation, and the necessities of the consumer. (195)

Where decrees have established the right and priority of appropriators for irrigation, or other purpose, without limitation as to the time of use, the courts have no power to invade the right so conferred, by prescribing times and seasons during which it shall be enjoyed.

The inconveniences, difficulties and controversies which must result from any such division the year, enlarged upon. (203, 204)

5. ——*Distribution of Water*, is to be made throughout the irrigation division, according to priorities, and not for a single district. (194)

6. ——*Waste in the Use of Water*, is to be restrained by proceedings against the offending parties only. (205)

7. ——*The Right to the Use of Water*, depends upon the needs

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of the appropriator. He is not permitted to apply water to his land unnecessarily, or in such volume as to amount to waste.

In this respect the law makes no distinction between appropriators for irrigation, for domestic use, or for power. As to all these purposes, where a valid appropriation is made, the right is limited only by the law of necessity. (203, 204)

8. CUSTOM—*Unlawful.* A custom established in a particular water district, that water shall be employed for direct irrigation only during a particular season of the year is contrary to statute and binds neither the water officials nor consumers from the same stream in other districts. (200)

Error to Larimer District Court.—Hon. HARRY P. GAMBLE, Judge.

Mr. JAMES W. MCCREERY, Mr. DONALD C. MCCREERY, Mr. L. C. STEPHENSON, Mr. STOTEN R. STEPHENSON, for plaintiffs in error.

Mr. L. R. RHODES, Mr. R. W. FLEMING, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The Larimer and Weld Reservoir Company, a corporation, defendant in error here, plaintiff below, on October 26, 1910, filed its complaint against the State Engineer, the Division Engineer of Water Division No. 1, and the Water Commissioner of Water District No. 3. Later, after sundry preliminary steps, an amended complaint was filed, setting forth the right of plaintiff to divert water for storage purposes from the Cache la Poudre river, under an appropriation dated the 3rd day of June, 1890, for 225,000,000 cubic feet of water, and one of date the 1st day of April, 1895, for an additional 100,000,000 cubic feet of water, decreed October 28, 1909, in Water District No. 3, by the Larimer County District

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Court; that at the time of filing the complaint large quantities of water were passing the headgate of its inlet canal; that no requirement existed for the use of this water for direct irrigation, either in Water District 3 or elsewhere; that plaintiff was entitled to store such water under its appropriation, in its reservoir; that the official defendants arbitrarily refused to allow it to do so. It was further alleged in the complaint "that in Water District 3 there are, and for more than twenty years have been, two well defined and recognized periods of time each year for the use of water flowing in the Cache la Poudre river and its tributaries; * * * that the use of water for direct irrigation commences on or about the 15th day of April of each year and terminates on or about the 15th day of September of each year, and from the 15th day of September of each year until the 15th day of April of the following year the water of said river and its tributaries can only be used economically for storage; * * * that for more than twenty years preceding the commencement of this action, the waters of said river and its tributaries have been, by common consent, so used; that all rights of appropriation of any of said waters for any purposes other than for storage, ceased and determined on the 15th day of September, 1910; and that such other rights have not been, and will not be, in force and effect until the waters of said river and its tributaries are needed and required to irrigate crops planted and growing during the coming season of 1911."

It was further alleged: "That on May 28, 1910, Division Engineer Cogswell issued an order to J. L. Armstrong, Water Commissioner for Water District No. 3, as follows: 'Water is needed for direct irrigation in districts numbered 8, 2, 1 and 64; you are hereby ordered to cease all storing of water in your district until further

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notice from this office. Water must not be wasted into reservoirs at the lower end of ditch when the reservoir is not entitled to storage water, but the excess water should be shut off the ditch at the headgate. In case of heavy rains or floods report to this office immediately by phone at my expense.' "

The complaint further states, in effect, that this order was renewed on the 1st day of September, 1910, and was then in full force and effect; that at no time covered by said order was there any demand in said district for such order, or for the delivery of water, but that such order was uncalled for and was an assumption of authority and power on the part of said defendants; that if there is any person, company or association making any claim or demand whatever for water for direct irrigation, such claim and demand is illegal and unjust: that since the 15th day of September, 1910, there has been, and until the 15th day of April, 1911, there will be, no need or demand for water for direct irrigation in either Water District No. 1 or 64, and that any such use of such water would be wasteful and not an economical or beneficial use, and would be contrary to law.

The complaint concludes with a prayer for a perpetual injunction against the official defendants and their successors in office, restraining them from enforcing the order complained of, and also for a decree to the effect that in Water District No. 3, the Cache la Poudre river and its tributaries, the direct or immediate irrigation period commences on the 15th day of April of each year, and extends to the 15th day of September of each year, and that the storage season therein commences September 15th of each year, and ends April 15th of the succeeding year.

The original defendants, the water officials, answered, alleging that they are public officers charged

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with the distribution of water of the public streams, according to the order of priority as fixed by judicial decrees; that in the exercise of their official duty they had conformed, as advised, to the law in all respects without favor or discrimination; that the Division Engineer had made the order set forth in the complaint; that said order was in full force and effect, but subject at all times to change and modification when advised that the flow of water in the streams would permit storage, and that they, and neither of them, were parties in interest in the proceedings, were neither owners nor appropriators of water of the streams, but were acting solely in the exercise of the police power conferred by statute in that behalf, and pursuant to previous orders of the court; that appropriators of water for direct irrigation in Water Districts 1 and 64 were claiming and demanding the right to use the water in the South Platte river, under and by virtue of their several prior appropriations. All other averments of the complaint were denied on information and belief.

The plaintiffs in error here, who are direct irrigators, made defendants by order of court, filed answer to the amended complaint, setting up several defenses: First. That their rights as appropriators of water from the Platte river in Water District No. 1 are superior in point of time and use to the appropriation of the plaintiff for storage purposes; their present needs of the same for direct irrigation; their use and enjoyment of water under and pursuant to their several decrees, and admitting the issuance of the order complained of, as set forth in the complaint; they denied the alleged superior rights of plaintiff, and also the existence of a custom or law fixing a storage season anywhere, as against a diversion of water by prior appropriators for beneficial uses; Second. That the amended complaint does not state facts

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sufficient to constitute a cause of action, or show the priority of the appropriation claimed and set forth by plaintiff, or the appropriators of the several answering defendants, and also that the court was without jurisdiction to proceed to the determination of the cause, because the appropriators of water for direct irrigation in the several other water districts of that division are not joined as defendants, being necessary and indispensable parties; and, Third. For an affirmative answer and defense, that they are direct irrigators in Water District No. 1, from the Platte river, setting forth fully and specifically their rights and dates of decreed appropriation, and the use of all water that could be obtained under their several appropriations, at all seasons of the year, for direct and beneficial use in the irrigation of their lands and crops, and that they had been in such enjoyment and use of their respective appropriations and rights ever since their said several appropriations were made and decreed. By replication issue was joined upon all new matter set up in the answer.

A careful analysis of the allegations of the complaint leads to the irresistible conclusion that the real object of the action was to have the court enter a decree dividing the year into two seasons, one for direct irrigation, and the other for the storage of water, and the court gave relief substantially as prayed. The effect of the decree was to declare and fix, in the territory involved, the season in which direct irrigation, so called, might be practiced, and the season, or portion of the year, when waters flowing in the natural streams must be wholly surrendered by direct irrigators, to storage purposes. In short, the suit was a proceeding to compel by injunction the official defendants to furnish water for storage, regardless of the priorities or actual necessities of appropriators for direct irrigation, on the ground that

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in any event, all right to the distribution of water for direct irrigation ceases during the period from the 15th day of September of each year to the 15th day of April next thereafter. Upon a full consideration of the averments of the complaint it is impossible to reach any other conclusion than that this was not only the primary, but the sole object of the action.

The sufficiency of the amended complaint was challenged on the grounds: First. That necessary and indispensable parties were not joined as defendants; Second. That no facts were pleaded by which it was made to appear that the official defendants were acting in excess of the authority conferred upon them by law; and, Third. That no facts were pleaded from which it appeared that the priority of appropriation claimed by plaintiff was prior to or dominated the rights of plaintiffs in error and other appropriators of water for beneficial uses within Water District No. 1, and in other water districts embraced in Water Division No. 1.

Since, as we have seen, the prime object of the action was to obtain a decree of court, dividing the year into irrigating and non-irrigating seasons, designating the season in which direct irrigation, so called, might be practiced, and the season or portion of the year when the waters flowing in the stream must be surrendered to storage purposes, and which during that time could only be diverted and employed for the latter purpose, it is manifest that all appropriators of water for direct irrigation from the South Platte river water-shed forming a portion of Water Division No. 1, embracing Water Districts No's 1, 2, 3, 4, 5, 6, 7, 8, 23 and 64, would of necessity be affected by any such decree; indeed, the effect of the finding and judgment of the court was to declare that direct irrigation in that water division could not, during the period from the 1st day of October of each year to the

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15th day of April of each succeeding year, be lawfully carried on, and to permanently deny that such right existed during such period. If direct irrigators in Water Districts 1 and 64 were necessary and indispensable parties as held by the trial court, upon like reasoning it follows that all other direct irrigators in the division, especially those with senior rights to those of the plaintiff, were equally interested in the subject and object of the action and likewise necessary and indispensable parties.

Under statutory provisions, and the decisions of this court, the river with its tributaries must be administered by the water officials as a whole, and all the decrees and appropriations of the water division of which Water District 3 is a part, collated, tabulated and combined for the purposes of such administration according to priorities. It follows that all priorities of appropriation for direct irrigation in the several districts comprising that division would necessarily be affected by the proposed decree, for it prescribes new methods and new rules, binding upon water officials, for the distribution of water throughout such division, methods and regulations totally different from those prescribed by law, under which the water officials, the original defendants herein, had theretofore acted in such distribution between the several and respective appropriators and users of water, for beneficial purposes in that drainage. The water officials are nominal parties only. The broad and sweeping relief asked, if competent at all, clearly could be awarded only against actual appropriators and users of water for direct irrigation in the division, as they were the real parties in interest. They alone were interested in the subject-matter of the suit and its object; the proposed decree would materially affect their rights. They were, therefore, not only proper, but necessary parties, and without having them before the court no binding or

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effective decree, such as was sought and in fact rendered, can be upheld. In *McLean v. Farmers' H. L. C. & R. Co.*, 44 Colo. 184, 194, 98 Pac. 16, 19, speaking to a proposition closely akin to the one now being considered, the court, at page 194, said:

"The relief demanded by the complaint could not be granted against the water officials without prejudice to the rights of these consumers; neither could their rights be saved in their absence, for the obvious reason that they were the parties who would be directly affected by the judgment demanded. * * * Necessary parties are all who have an interest in the subject and object of the action, and all persons against whom relief must be obtained in order to accomplish the object of the suit."

It is obvious that a division of the year into two separate and distinct seasons, during one of which water is to be stored and during the other to be used for direct irrigation, which is plainly in conflict with statutory provisions providing for the distribution of water, materially changes the situation of direct irrigators throughout the whole division, and could not therefore be properly decreed in any event, without giving all persons so interested and affected opportunity to be heard. The objection, therefore, that necessary and indispensable parties had not been brought in was sound, and the court ought not to have proceeded without having all such parties before it.

The objection that the complaint sets forth no facts showing or tending to show that the water officials were acting contrary to law was also good. The allegations of the complaint as to the water officials in this respect are substantially as follows:

"That said defendants Cogswell, Comstock and Armstrong refused and still refuse to allow this plaintiff to receive from the said river and its tributaries said

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water, and plaintiff states that the acts of said defendants and their refusal to allow plaintiff to receive such waters through the headgate of its inlet canal for storage are unwarranted, illegal and in violation of plaintiff's decreed rights."

In paragraph 20 of the complaint the plaintiff sets out the order of the Division Engineer complained of, and concludes that paragraph in the following language:

"That such order was uncalled for, and the assumption of a power and authority on the part of said defendants, Cogswell and Comstock, that they as public officials, have no legal authority to assume or make; that it was an assumption of power and authority not conferred in any manner upon them, by or under the laws and statutes of this state."

This order shows upon its face that it was made in precise accord with the police statutes of the state, governing the method of distribution of water between various appropriators, in the discharge of their public duties in the distribution of water to ditches and consumers according to their respective rights and priorities. In *McLean v. Farmers' H. L. C. & R. Co., supra,* speaking to this point it is said:

"By section 2448, 1 Mills' Statutes, it is made the duty of the superintendent of irrigation to distribute the waters in his division in accordance with the rights of priority of appropriation as established by the judicial decrees entered in the several water districts included in such division, and that he shall have general control over the water commissioners of the districts embraced in his division. The several decrees of the water districts within a water division are to be treated as one, and the water distributed accordingly. * * * It is charged, however, that the acts of the defendants in closing down plaintiffs' headgates were wholly unauthorized,

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illegal and unlawful. * * * This statement does not aid the complaint, because it is but a statement of a mere legal conclusion without any statement of facts upon which to base it. * * * In short, none of the averments of the complaint to which we have referred, nor all taken together, state any cause of action against the defendant water officials, for the reason that it appears that they were only acting in their official capacity, and no facts are pleaded from which it is made to appear that they were acting in excess of the authority conferred upon them by law."

That is precisely the situation which confronts the court in this case. The complaint is barren of facts which in any way show that the water officials were acting beyond, or contrary to, the authority conferred upon them by law. From anything that is made to appear by the averments of the complaint, they were clearly acting within their power and doing only that which the law enjoined upon them, as such officials, to do.

It is further urged against the complaint that it does not state facts sufficient to state a cause of action against the direct irrigators who were made defendants in the suit. It was incumbent upon the plaintiff in this connection to show affirmatively by proper allegations that it had a superior right to these defendants to divert the water of the Cache la Poudre river for storage during the period named. It is not sufficient in a case of this kind for the plaintiff to show that it has made an appropriation of water for storage and has obtained a decree therefor. It must go further and show that the right so decreed is relatively prior to that claimed by the parties in interest against whom relief is sought. In other words, the plaintiff should have shown by the averments of its complaint, in order to state a cause of action, that its alleged rights dominated the rights of the direct

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irrigators whose right of use it undertook to have denied. Since the complaint failed to do this, it is in that respect insufficient.

The supposed cause of action is based upon the proposition that on the 15th day of September of each year the season for direct irrigation ends, and that none of the defendant appropriators of water for direct irrigation could, after that date, nor until the 15th day of April of the following year, as against one claiming water for storage, although junior in point of time, lawfully divert water to be applied to the direct irrigation of land or crops. This proposition is fundamentally wrong, and is in conflict with the provisions of our constitution to the effect that the water of every natural stream not heretofore appropriated within the State of Colorado is declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided; that the right to divert the unappropriated water of any natural stream to beneficial uses shall never be denied, and that priority of appropriation shall give the better right as between those using water for the same purpose. Plaintiff, by the averments of its complaint, relies for relief upon the bare fact that the defendants, who are direct irrigators, are, as matter of law, limited to the diversion and use of water to the period from April 15th to September 15th of each year, without reference to the date of their several priorities, and that, as is alleged, any use of water for direct irrigation by them outside of this period is an unlawful use, which interferes with the right of plaintiff. It is solely because of such supposed limitation upon the right of use by the defendants, direct irrigators, that plaintiff claims its appropriations are superior to theirs. These allegations, since only conclusions of law, based upon and following

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false and erroneous assumptions, are stated, are insufficient to make out a cause of action against the defendants, who are direct irrigators. In order to entitle an appropriator of water to maintain an equitable action against the use of water by another appropriator, it must be shown by allegations of fact that the one seeking such relief has a dominant and superior right, both in point of time and necessity of use. Nothing of this sort is made to appear in the complaint, but by necessary inference and implication the very opposite is shown.

In *Carroll v. Vance*, 39 Colo. 216, 88 Pac. 1069, upon the question of the sufficiency of the complaint to entitle one appropriator to restrain an alleged unlawful diversion of water by another, this was declared.

"A complaint, in an action by a senior appropriator to restrain an unlawful diversion of water, which merely alleges that plaintiff has a priority superior to that of the defendant, with which the defendant is interfering, is but a mere conclusion of law, and is not a sufficient statement of ultimate facts constituting a prior appropriation, but it is necessary to state the facts which show such appropriation and its priority."

In *McLean v. Farmers' H. L. C. & R. Co., supra*, it was said:

"The object of the action was to prevent these officers from causing water to flow down the stream for the use of appropriators in District No. 2, and in order to effect this and it was necessary that the rights of plaintiffs to the subject-matter of controversy be adjudged superior to those of these appropriators."

Surely unless facts are set forth in the complaint which show such superiority of right no cause of action is stated, and in the absence of such averments no superiority of right could be adjudged.

Beginning with the first application of water in Col-

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orado to beneficial uses, the right of preference to such use between respective claimants has been made to depend upon prior appropriation and necessity of use. This doctrine has become thoroughly entrenched in our jurisprudence, through constitutional and statutory provisions, and by a uniform and unbroken line of judicial decisions. The complaint is framed upon a theory in direct conflict with this well settled doctrine, and to hold that it states a cause of action would completely overturn and nullify this primary and fundamental rule.

The further allegations in the complaint to the effect that for more than twenty years preceding the commencement of this action, in Water District No. 3, the waters of the Cache la Poudre and its tributaries have by common consent of the water appropriators therein been used and employed for direct irrigation during the period from the 15th day of April of each year to the 15th day of September of each year, and that from the 15th day of September of each year to the 15th day of April of the following year these waters have been given over to storage, are relied upon to constitute a cause of action. If it be true that such custom and usage has thus prevailed in this particular water district, it is directly contrary to the statute, and cannot therefore be established for any purpose. 12 Cyc. 1054; *Bacey v. Gallagher,* 20 Wall. 670, 22 L. Ed. 452. Furthermore, the Cache la Poudre river, which comprises Water District 3 of Water Division 1, is a tributary of the South Platte, and its waters are waters of the South Platte, and they can no more be interfered with adversely to the rights of other consumers in the several other districts in that division, by junior reservoir appropriators, than can the waters of the South Platte proper, immediately adjacent to their headgates. And even if the custom and usage alleged were fully and satisfactorily established by com-

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petent proof, it would not bind either the water officials, or consumers of water from the same streams in the several other districts of the same water division.

In *McLean v. Farmers' H. L. C. & R. Co., supra,* it was said:

"With priorities settled it became necessary to appoint officials whose duty it is to distribute the waters of a stream according to the decreed priorities therein. Their functions and authority cannot be interfered with without ignoring adjudication decrees, and the statutes relating to the distribution of water thereunder, which would bring about the conditions that existed prior to the time when we had any statutes on the subject relating to the adjudication of rights to the use of water or its distribution by officials in accordance with such adjudication. The laws of the state providing for officials to distribute the waters of our streams for agricultural uses according to adjudicated priorities were passed for the purpose of securing an orderly distribution of such waters, and to prevent breaches of the peace which would inevitably ensue if the owners of priorities were permitted to divert and divide the waters of our streams according to their ideas of their adjudicated rights and needs. These laws must be strictly enforced and observed, and the courts have no power to annul them."

In *Larimer & Weld Reservoir Co. v. Water Supply & Storage Co.,* 25 Colo. 87, it was held in substance and effect that the tributary from which a junior appropriator takes must first answer to a senior appropriator from the main stream. In *McLean v. Farmers' H. L. C. & R. Co., supra,* on authority of *Lower Latham Ditch Co. v. Louden Canal & Reservoir Co.,* 27 Colo. 287, 60 Pac. 629, 83 Am. St. 80, speaking to this point, it was said:

"The several decrees of the water district within a water division are to be treated as one and the water

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distributed among them. It is the duty of the superintendent of a water division to make such distribution by direction to the water commissioners under his control."

The foregoing states the lawful method by which water is to be distributed to users throughout a division, that is according to priorities, not for a single water district, but for the entire drainage, as the statute provides. Priorities are not to be administered by regulations resting on custom, use or agreement between irrigators of a particular district, where their enforcement would interfere with the rights of other users in other water districts of the same division. That is, users and consumers of water for irrigation in one district cannot make and apply regulations in the administration of their priorities according to their own interpretation of them, and to meet their needs as they think they should be met; but the waters of a division must be distributed to all consumers under the uniform rule provided by law.

The demurrer to the complaint on the ground that facts sufficient to constitute a cause of action against the defendants, who are direct irrigators, are not stated, should therefore have been sustained.

It follows from what has already been said that the judgment under consideration must be reversed, but as the case was tried upon its merits it is not only proper, but to the interest of all parties that we express ourselves more fully and directly upon the main features of the case.

From the evidence, and the record as a whole, it is disclosed that the decrees of the defendants, direct irrigators in Water District 1, were and are prior in time and use to that of the plaintiff, and that such decrees are without limitation as to time of use. The question being one of necessity of use, the matter of season alone cannot be controlling. While that may be a factor bearing upon

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such necessity, it is not, and cannot be made, the sole consideration. To permit courts to arbitrarily fix a definite season when water for direct irrigation may be used would be to allow them to fasten a limitation upon a vested right not attached to it by the decree itself, or by any constitutional or statutory provision or decision of this court. It appears that all these decrees have been in force for years, and that water has been diverted and used under them at any and all times. To now judicially declare that the users thereunder can divert and apply water for the irrigation of their lands and crops from April 15th to October 1st of each year only, is in effect a modification of decrees vesting property rights, which have been used and enjoyed, without such limitation, for upwards of twenty-five years. No lawyer would contend for, and no court would now permit, such a modification in a direct proceeding for that purpose. This being true, how can it be held lawful and proper for the court, by the indirect method of dividing the year into seasons for direct irrigation and for storage, respectively, to accomplish such result? It is a universally accepted legal maxim that courts may not do indirectly that which they are without power or authority to do directly. These decrees had no time limit within which use could be made of them when awarded. Where, and with what tribunal, does the power and authority now lie, after such a lapse of time, to arbitrarily attach to them such limitation? We are confidently of the opinion that courts have no such power, and that the question of the division of the year into direct irrigation and storage seasons is not a judicial one. In the very nature of things no season can be judicially fixed for the use of water for domestic purposes, or for the use of water for power or manufacturing purposes. In this respect the law discloses no distinction between appropriations for agricultural and for

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domestic and manufacturing purposes. The use of water for all these purposes, when a valid appropriation has been made, is limited only by the law of necessity. Appropriations for each of these beneficial uses take effect and may be enjoyed by the rule of priority, and under the Constitution none of them yields to the other in regard to date by reason of the character of use. In fifty years of experience in practical irrigation in this state neither the legislature nor this court has attempted to fix an arbitrary season for direct irrigation. Whether the legislature might do so is not before us, and therefore not only is not, but could not now properly be, determined. That question is, therefore, left entirely open and unaffected by this decision.

In the light of the history and development of this all important industry, consideration being given to the different altitudes of the different parts of the state, and even in the different water divisions thereof, where agricultural pursuits are carried on, varying climatic conditions, changes in the character and nature of the seasons from year to year, difference in soil and variety of crops grown, it would be impossible for the courts to lay down a uniform rule definitely fixing such a season, which could fairly be said to afford parties interested equal protection of the law. If courts may arbitrarily fix a season covering the period from April 15th to October 1st of each year, why may they not with equal propriety designate a much shorter season, or an entirely different one? If the matter is to be left to the courts at all, seasons of varying length, covering different periods, according to the experience, observation, environments, moods and caprice of each particular judge, having such question under consideration, would inevitably follow, resulting possibly in injustice and inequality, and certainly in endless conflict and confusion, with attendant strife and interminable litigation.

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Much argument has been indulged respecting non-economical and wasteful use of water. As we view the allegations of the complaint, these questions are not properly before us. For, as already indicated, and as shown by the decree of the court, this was a suit to have the time of use of the waters of the Cache la Poudre river and its tributaries for irrigation purposes divided into two seasons, during one of which they might be employed for direct irrigation and the other for storage. There is no pretense that the suit was one to restrain waste, or to enforce economical use. No such relief was sought or given. This action in fact is not, and cannot be, one for these purposes. An action of such a character could only be maintained against the person or company guilty of unlawful conduct in that respect, or against those who jointly participate in such infractions of the law. Individuals, companies or corporations guilty of separate or independent offenses of this character could not properly be joined in an action for relief, as was done here. Each separate offender, or those acting jointly, would be held to answer for his or their own wrong in independent actions. In this connection it may not be amiss to state that it is not intended by this opinion to indicate that direct irrigators are to be allowed to take, have or receive water, under their decrees, in excess of their needs, nor are they to be permitted to use water in such a non-economical way as to amount to waste. In all such cases a right of action by a junior appropriator, injured by that character of use, may be maintained and relief granted, upon proper allegations and proofs, when water officials fail or decline to give proper protection.

This court recognizes the urgent and ever increasing necessity for the enforcement of the doctrine of economical use of water for irrigation, as it has consistently done

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in the past, and urges upon the officers of the law, the courts and users and consumers of water themselves, ready acquiescence therein and an efficient enforcement thereof. Whenever there is a wasteful, or other unnecessary or unlawful use of water, it should be promptly and efficiently dealt with under the law. By this opinion the rights of the direct irrigator are in no sense enlarged or broadened, but they are only declared as they now exist, and have existed since the entry of their respective decrees.

It is also urged that this court has recognized the fact that there may be a limitation as to the time of use upon decreed appropriations of water for irrigation, which is true, but this has occurred only when the decree itself fixed the limitation, or where in a proper action it had been shown, by competent evidence, that the actual use had been in fact so limited. Upon the whole record, including the decrees submitted and the proofs adduced respecting the diversion and use of water under them, the situation here appears to be precisely contrary to that shown to have been present in cases where such limitation was recognized.

Other matters of moment and engaging interest have been most ably presented in the briefs of opposing counsel, but they are not of a character to affect or alter the views of the court as already indicated upon the fundamental and controlling questions presented, and we refrain, therefore, from consideration of, or comment upon, them.

The judgment is reversed and the cause remanded to the trial court with directions to dismiss the complaint.

Decision *en banc*.

MR. JUSTICE GARRIGUES dissents.

Mr. Justice White, concurs in the reversal of the

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judgment, for the reason that the complaint as subject to the demurrer interposed by plaintiffs in error upon the grounds assigned therein. He expresses no views upon matters discussed in the opinion, after it had once been determined that the complaint failed to state a cause of action.

Mr. Justice Hill not participating.

[No. 7652.]

PRINCESS AMUSEMENT COMPANY ET AL. v. F. E. EDBROOKE ARCHITECT COMPANY.

CONTRACTS—*Construed.* Plaintiff, an architect, was employed by a corporation to prepare plans and specifications for remodeling a building, in order to convert the same into a theatre. A contract in writing was entered into, fixing the architect's duties and compensation. It was afterwards discovered that the proposed transformation was impracticable. New parties became interested in the enterprise, and a new corporation was organized. The building was torn down and a new one erected. The architect was continued in charge of the work until its completion, with the understanding that he was acting under the original employment. *Held* that the original contract establishing the architect's compensation and was properly received for that purpose.

On Rehearing.

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Mr. JOHN T. BOTTOM, Mr. MILNOR E. GLEAVES, of counsel, for plaintiffs in error.

Mr. T. J. O'DONNELL, Mr. CANTON O'DONNELL, for defendant in error.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

This action was brought by the F. E. Edbrooke Architect Company against The Moore & Greaves Amusement Company, The Princess Amusement Company and George C. Moore and George H. Greaves, copartners as Moore & Greaves, for architectural services rendered in the construction of the Princess Theater in Denver, and to foreclose a mechanic's lien on the property.

1. In 1909, Moore and Greaves contemplated the construction of a moving picture theater building, and for that purpose leased certain lots on Curtis street, the building located upon which, they proposed to remodel into a theater building. With that end in view, they consulted plaintiff as to the feasibility of making the changes in the old building, and having organized a corporation under the name of The Moore & Greaves Amusement Company, executed and delivered to defendant in error, the following instrument:

"Dec. 1, 1909.

To The F. E. Edbrooke Architect Co.,
510-13 Tabor Grand Opera House Bldg.,
Denver, Colo.

I hereby authorize and direct you to prepare plans, specifications and such other drawings as may be necessary for the proper erection and completion of a remodeling at 1618 to 1624 Curtis St., Denver, for theater purposes, and to procure from builders and contractors estimates for the construction of the said building and by and with my consent to let contracts for the same, and to superintend the work and construction of the said building, and to issue certificates or vouchers for the payment of contractors or others entitled to such payments in accordance with the terms of their respective contracts, and for such services as aforesaid by you performed I

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hereby agree to pay you a sum equal to ten per cent of the total cost of the aforesaid building and appurtenances thereof, payable in manner following:

Upon completion of plans and specifications, 5 per cent of cost.

Thirty days after occupancy, 5 per cent addition of cost or balance due.

All labor or materials furnished by me for use in the construction of the aforesaid building and appurtenances shall be included in the aggregate cost thereof, and be subject to your commission as aforesaid.

Plans, drawings and specifications are the property of the architect.

Witness my hand and seal the day and year first above written.

MOORE & GREAVES AMUSEMENT CO. (SEAL)
By G. C. MOORE, Prest.
By G. H. GREAVES, Secy.

Accepted:

THE F. E. EDBROOKE ARCHT. CO.,
By F. E. E."

This document was introduced in evidence by plaintiff, marked exhibit "A", and will be referred to hereafter.

Plaintiff prepared sketch plans for the reconstruction of an old building, which it was found later could not be remodeled into a theater, and these were discarded; the original structure was torn down and removed, and an entirely new edifice called the "Princess Theater" erected in its place. When it was found the old building could not be used and a conclusion was reached to build a new theater, it was ascertained that the cost was greater than The Moore & Greaves Amusement Company could finance, and Mr. A. T. Mackey became identified with the enterprise and agreed to furnish

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the additional funds. A new corporation was then organized, known as The Princess Amusement Company, which proceeded to carry out the purpose of the organization by the erection of the new building.

Plaintiff alleges in its complaint:

"15th: That while at the time of the original employment of plaintiff, as herein aforesaid, it was contemplated by the defendants, Moore & Greaves and The Moore & Greaves Amusement Company, that the services to be by the plaintiff rendered under its said employment, would be in the remodeling of an old building then upon the property, the said defendants afterwards changed their plans in that respect and tore down and removed the said old building and constructed an entire new building upon said premises, which is known as The Princess Theater Building, but that nevertheless, the employment of the plaintiff was continued by the said defendants upon and without any change in the terms or conditions thereof as hereinbefore stated."

The trial was to the court and plaintiff was given judgment, to reverse which, defendants bring the case here.

2. The record is exceedingly voluminous, and many errors are assigned, but we think it necessary to determine but one proposition.

Defendants, plaintiffs in error, contend the written contract, exhibit "A," was for remodeling an old building only, and when that plan was discarded, and it was decided to erect a new structure by a company organized for that purpose, the written contract was abandoned and did not cover plaintiff's services in the construction of the new theater, which services were of an entirely different character, for which a much less charge is ordinarily made by architects; that there being no express contract for the services in connection with the Princess

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Theater, the action was, or should have been based upon quantum meruit, and not upon express contract.

Under the allegations of the complaint above set forth, that the employment was continued without change, evidence was introduced showing that while a new corporation was formed after the execution of exhibit "A," the same people were interested in the new company, and there really was no change in the parties or management, except that Mr. Mackey was taken in to furnish the additional capital necessary to complete the erection of the new theater, and a new company was formed for the purpose of carrying out and completing the plans already contemplated; that the Edbrooke Company continued its services with the understanding that it was working under the terms of exhibit "A," so far as its compensation was concerned, and the exhibit was resorted to and introduced in evidence, not for the purpose of proving an express or written contract as the basis of employment, but to show, under the allegations of the complaint, the amount of compensation and method and terms of its payment. There is uncontradicted testimony to the effect that one or more of the defendants went to the plaintiff company and asked for a reduction from the ten per cent it was to charge for its services in the erection of the new building, that plaintiff refused to make any change in that respect, and the Princess Amusement Company paid the Edbrooke Company one thousand dollars on account, and continued to receive the benefit of its services in and about the construction of the new building until it was completed, knowing that plaintiff was claiming as its compensation, ten per cent on the cost of the new structure.

Under these conditions, we cannot say that exhibit "A," in so far as the compensation is concerned, was not

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adopted and acted upon by all the parties in the construction of the new theater.

The former opinion is withdrawn, and the judgment of the lower court affirmed.

Affirmed.

Decision *en banc.*

[No. 7687.]

KINGSBURY v. VREELAND.

1. VENUE—*Change of Venue—Time of Application—Waiver.* The right to change the venue of an action brought in a county other than that prescribed by the statute is a mere personal privilege, and ordinarily is considered as waived by a general appearance and an answer to the merits; or if the application is not interposed in apt time. (214)

Summons was served on defendant on July 2nd; August 15th he filed a demurrer to the complaint; November 5th an amended complaint was filed; on the 11th of January following defendant filed his answer thereto and on March 30th, his motion for a change of venue. *Held* not in apt time. (214)

2. PLEADINGS—*Judgment Upon,* is not to be granted when the defect complained of is one which may be cured by amendment. (215)

3. ——*Amendments—Discretion of the Court.* Amendments, and the time they may be filed, are largely in the discretion of the trial court. (215)

4. ——*New Cause of Action.* The original complaint alleged the sale by plaintiff to defendant of an auto car, and that plaintiff, upon defendant's paying therefor on delivery, would accept in part payment a certain second hand car. An amended complaint made no allusion to the second hand car. The answer set forth the agreement as to this car, and claimed a credit therefor. An amended reply admitted the agreement, but alleged that it was upon condition that defendant should pay the residue of the purchase price of the car sold, by a certain day, and that this condition was not complied with.

In the same case the original reply admitted a defect in the car

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sold, which plaintiff promptly replaced and corrected. The amended replication omitted this admission and averred that the car sold was perfect in all its parts.

The court declined to say, in either case, that the amendment stated a new cause of action, or was a departure.

5. ——*Matter not Alleged.* A fact nowhere alleged in the pleadings is not to be invoked to discredit the findings. (219)

6. BILL OF EXCEPTIONS—*When Necessary.* There being no bill of exceptions the court declined to say that the trial court abused its discretion in allowing an amendment of the reply during the trial. (215)

Prejudice of the trial judge was relied upon as ground of a motion for a new trial, and an affidavit setting up a conversation occurring during the trial, in which his honor presiding exhibited temper, was relied upon to establish this prejudice. The court declined, upon this partial showing of the occurrences of the trial, to overrule the action of the trial judge, denying the motion. (217)

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Mr. CHARLES W. FRANKLIN, Mr. H. A. HICKS, Mr. CHARLES ROACH, for plaintiff in error.

MESSRS. VAN CISE, GRANT & VAN CISE, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

As no bill of exceptions has been preserved, our consideration of alleged errors must be limited to matters covered by the record proper. This action was instituted in the District Court of the City and County of Denver to recover a part of the purchase price, etc., for an automobile sold and delivered by the plaintiff to the defendant, also for services and expenses alleged to have been rendered and incurred in connection therewith. Judgment was in favor of the plaintiff.

It is claimed that the court erred in overruling the defendant's motion to change the place of trial to Sum-

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mit county, where he resided. This motion came too late, for which reason, we will not determine whether it should have been granted, had it been filed in apt time. The record discloses that summons was served upon the defendant in the City and County of Denver on July the 2nd, 1910; that on August 15th he filed a demurrer to the complaint; that on October 17th this demurrer was sustained; that on November 5th an amended complaint was filed; that on January 11, 1911, the defendant filed his answer; that on March 11th, following the plaintiff filed his replication; that on March 30th, following, the defendant filed his motion for a change of venue. The right to have the place of trial changed in this class of actions because brought in an improper county, is not jurisdictional; it is a mere personal privilege which may be waived, and ordinarily, is to be considered as waived by a general appearance and pleading to the merits. It is also waived unless the motion is interposed in apt time. It will be observed that the defendant did not interpose this motion until about nine months after service of summons, which was made in the residence county of the plaintiff, and not then until after the issues had apparently been settled in the county in which the action had been brought. Under such circumstances, were he originally entitled to the change, the motion came too late.—*Burton v. Graham,* 36 Colo. 199, 84 Pac. 978; *Kirby v. Union Pacific Co.,* 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913B, 461; 22 Ency. Pl. & Pr. 815; *Denver, S. P. & P. R. R. Co. v. Roberts,* 6 Colo. 333; *School District v. Waters,* 20 Colo. App. 106, 77 Pac. 255; *Wasson v. Hoffman,* 4 Colo. App. 491, 36 Pac. 445; *D. & R. G. R. Co. v. Cahill,* 8 Colo. App. 158, 45 Pac. 285; *Forbes v. Grand Co.,* 23 Colo. 344, 47 Pac. 388; *Smith v. Merrill,* 12 Colo. App. 233, 55 Pac. 824.

The alleged motion for judgment on the pleadings,

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the overruling of which is assigned as error, does not appear in the record proper. It was evidently not in writing. Counsel have included in their abstract of record a purported lengthy colloquy between Court and counsel, which purports to include an oral motion for judgment on the pleadings. It was at this time that the plaintiff was allowed to amend his replication. This court has repeatedly held that a motion for judgment on the pleadings cannot take the place of a general demurrer. It follows that it should not be sustained where the defect complained of is proper to be cured by an amendment. Such were the facts here.—*Fehringer v. Martin Drug Co.*, 56 Colo. 445, 138 Pac. 1007; *Williams v. Fuel Co.*, 55 Colo. 133, 133 Pac. 742; *Richards et al. v. Stewart*, 53 Colo. 205, 124 Pac. 740; *Thomas v. Ray*, 48 Colo. 423, 110 Pac. 77; *Roberts v. C. S. & I. Ry. Co.*, 45 Colo. 188, 101 Pac. 59; *Cache La Poudre I. Co. v. Hawley*, 43 Colo. 32, 95 Pac. 317; *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720.

It appears that the plaintiff was allowed to file an amended replication during the progress of the trial, which it is claimed, was to the prejudice of the defendant. Without the evidence before us, we cannot say that the court abused its discretion in this respect. Amendments and the time when they can be filed are largely within the discretion of the trial court.—*Jordan v. Greig*, 33 Colo. 360, 80 Pac. 1045; *Davis v. Johnson*, 4 Colo. App. 545, 36 Pac. 887; *Cascade Ice Co. v. Water Co.*, 23 Colo. 292, 47 Pac. 268; *Harrison v. Carlson*, 45 Colo. 55, 101 Pac. 76.

Trial was to the court. It is claimed that the judge expressed and exhibited bias and prejudice against the defendant and his counsel, which disclose that he could not give him a fair trial, and for this reason the motion for a new trial should have been granted. The only record presented is alleged statements of the judge set forth

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in the motion for a new trial and in the affidavit of the defendant in support thereof, wherein he states that when testifying the court made certain remarks. The testimony and remarks set forth are as follows:

"Q. What instructions did Mr. Vreeland give Pavelka? A. I don't know; I says to him, you stay here and make this run, or see if you can. Don't go away until you see that. They are willing to say that the colored boy is competent, and he told me the colored boy was competent, and he slipped away without letting me know he was going. And he attempted to do certain things, I can say that, and he did, but it didn't run right while he was there. They tried to run it, but they couldn't get it to go, unless it was down hill fifty feet. When he came back here, he, Mr. Vreeland, wrote me and said everything was all right.

Mr. Grant: I object to that as hearsay.

The Witness: I have got it in it.

The Court: That will all be stricken out.

Mr. Franklin: To what point?

The Court: The Court asked you to control your witness.

Mr. Franklin: I am trying to control him.

The Court: No you are not. You and your client cannot run this court.

Mr. Franklin: I thought that was competent evidence. If you mean to strike out the part concerning the conversation with Vreeland, why, I want to save an exception. But I don't understand just where it begins.

The Court: Do you think witness can answer counsel, both of you talking to him at the same time? Have him proceed.

Mr. Franklin: Colonel, you are not to speak to counsel.

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The Witness: I beg pardon, he spoke to me first, so I spoke back.

The Court: Proceed."

The plaintiff contends that this is not a part of the record proper and has moved to strike it. We think it unnecessary to consider this question. When passing upon the motion for a new trial the judge, in a way, had before him the entire evidence and the remarks of court and counsel, he had heard it all. The small part set forth in this motion discloses that there was other testimony and evidently other remarks which preceded, as well as followed, this, as there is in all cases. It is not claimed such was not the case here. Without anything further before us we are unable to say this discloses that the judge was prejudiced against the defendant, or his counsel, or at all, or to the extent that he could not give the defendant a fair trial.

For aught that we know there may have been no material conflict in the evidence upon the main issue, or it may have been overwhelmingly in favor of the plaintiff; were it here, we might be able to say that the findings could not have been other than they were. This expression of the court that counsel and his client cannot run this court, is of itself not an expression of prejudice against the defendant. The affidavit discloses that the witness was rather astute in his remarks to counsel, and was of the opinion that whether right or wrong he had succeeded in getting something in the record which he wanted there. When these matters are considered as a whole, as above stated, we do not think that a reversal should be granted for this reason, upon the record as presented.

It is claimed the pleadings disclose that the judgment was excessive. The original complaint alleges the sale of an automobile for an agreed price of $3,598.40;

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it also alleges that the plaintiff agreed upon defendant's complying with the terms of said sale, to-wit., to pay for said car on delivery, to take from him as part payment a secondhand automobile at the agreed credit of $750; that the defendant had the privilege of selling it for plaintiff, and did sell it for $450, but retained the money. The amended complaint presented the plaintiff's claim in two causes of action, one for the machine, and the other for services and expenses. It omitted all allegations pertaining to the secondhand car, presumably upon the theory that, inasmuch as the defendant had not complied with the conditions under which this credit was to be allowed that he was not entitled to it. The defendant, in his answer, set forth an alleged agreement concerning the secondhand car and his being entitled to a credit of $750 therefor. In his amended replication, the plaintiff admits that under certain conditions the defendant was entitled to this credit, but alleges that it was only upon condition that the defendant pay the remainder of the purchase price not later than August 20, 1909, which he alleges defendant has ever since failed and neglected to do. The court found all issues of fact in favor of the plaintiff, which, under the pleadings, would not entitle the defendant to any credit for the secondhand car, as there is no allegation in any pleading that the plaintiff ever received this car. Under this state of record, without the evidence before us, we cannot agree that the judgment was excessive in this respect. Neither can we agree because the original complaint states that this credit was to be allowed conditional that the new car was to be paid for upon delivery, and the amended replication that it was upon condition that the defendant pay the remainder of the purchase price not later than August 20, 1909, that the latter states a new cause of action or creates any material departure from the allegations of the orig-

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inal complaint which alleges that the car was sold and delivered to the defendant on the 26th day of July, 1909.

We cannot agree that the amended replication substitutes a new cause of action, it covers new matters referred to in the defendant's answer and cross complaint. The plaintiff's cause of action was set forth in his amended complaint. It was for the balance due upon an automobile, etc., sold and delivered and for services rendered, etc. These were never changed and the findings and judgment were for these items.

The contentions that no damages were allowed for an admitted defect in the new car covered by an admitted guaranty in the pleadings, and that there was a departure in the pleadings concerning these matters, are in some respects similar to those pertaining to the second-hand car. The original replication alleges that the new car was perfect in all its parts, etc., except a slight defect in one of the rear cylinders, which plaintiff promptly agreed to replace and did replace in accordance with the terms of his agreement. The amended replication does not include such an admission but admits that plaintiff promised that said automobile was of good quality and worth the value placed upon it by plaintiff and perfect in all its parts, and would do good work. Without the evidence before us we cannot say that this admission of a defect, coupled with an allegation of immediate replacement in the original replication, although omitted from the amended replication, is sufficient of itself to call for an allowance of damages and in no event does it create any departure from the original cause of action.

The judgment is affirmed.

Affirmed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

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[No. 7741.]

CITY AND COUNTY OF DENVER V. HOBBS ESTATE ET AL.

1. TAXATION—*Taxable Property—Stock in Foreign Corporation.* Under Rev. Stat. Sec. 5687, shares in the capital stock of corporations, either domestic or foreign, except banking corporations, are not taxable. (222)

The proviso to this section is not in conflict with sec. 6 of art. X of the constitution. (229)

2. STATUTES—*Construction.* The Revenue Act is to be considered as a whole. (222)

Error to Denver County Court.—Hon. JOHN R. DIXON, Judge.

Mr. BENJAMIN GRIFFITH, Attorney General, Mr. THEODORE M. STUART, JR., Assistant Attorney General, Mr. H. A. LINDSLEY, Mr. THOMAS R. WOODROW, Mr. I. N. STEVENS, Mr. GEORGE Q. RICHMOND, Mr. CHARLES A. PRENTICE, for plaintiff in error.

Mr. EDWARD C. STIMSON, Mr. HENRY C. ROGERS, *amici curiae.*

Messrs. GOUDY & TWITCHELL, Mr. J. H. BURKHARDT, for defendant in error.

Messrs. MACBETH & MAY, Mr. JULIUS C. GUNTER, Mr. MALCOLM LINDSEY, Messrs. HUGHES and DORSEY, Mr. JOHN Q. DIER, Mr. JOHN A. EWING, Mr. FRAZER ARNOLD, *amici curiae.*

Mr. JUSTICE HILL delivered the opinion of the court:

This is an action for taxes. The property is stocks in corporations of sister states, other than banking insti-

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tutions, which, at the time of his death, was owned by Charles M. Hobbs, a resident of this state. It was inventoried here as a part of his estate. It is claimed on the part of the taxing officers that these stocks are subject to taxation, separate and apart from the assets of the corporation. This position is challenged on the part of the estate. No question of inheritance tax is involved. The court held that pursuant to the provisions of section 5687, Revised Statutes 1908, the stocks were not thus taxable. In addition to the oral argument, elaborate briefs have been filed covering the entire field of taxation, including numerous papers of recognized students of ability upon the subject, numerous authorities, etc., a great deal of which, while instructive, is of but slight value in the disposition of this contention, for the reason the question is not what the legislature might do, or should have done in this respect, but what it has done by the enactment of section 5687, *supra.*

It is urged that the latter part of this section, which reads:

"*Provided, however,* That corporate stock shall be deemed to represent the corporate property, and except in case of banking corporations, shall not be taxed. The taxpayer need not return such stock in his schedule."

applies only to domestic corporations by reason of the constitutional provision which requires equal taxation of property, and forbids exemptions other than as therein specified. We cannot agree that the legislature thus intended; when tested by the language used it would be violative of elementary rules of construction. It would be to hold that they meant to say that which they did not say, and that they did not intend to say that which, in the clearest and plainest language possible, they have said. In such case it is not for the courts to give to the language any different meaning from that plainly ex-

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pressed:—*Hause v. Rose,* 6 Colo. 24; *People ex rel. v. May,* 9 Colo. 80, 10 Pac. 641; *Uzzell v. Anderson,* 38 Colo. 32, 89 Pac. 785, 1056; *Lake County v. Rollins,* 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; *City of Denver v. Domedian,* 15 Colo. App. 36, 60 Pac. 1107; *Hazleton v. Porter,* 17 Colo. App. 1, 67 Pac. 170.

We agree with counsel that the Revenue Act of which Section 5687, *supra,* is a part, should be considered as a whole. When thus done, it furnishes other evidence that the legislature intended this proviso to mean what it says, and that it was not intended thereby, or otherwise, that the capital stock of corporations either domestic or foreign, except banking institutions, should be taxed other than as the tax imposed upon the property of the corporation makes it a tax upon the stock. Sections 5575-5581, R. S. make specific provisions for the listing of lands, merchandise, manufactures, notes, bonds and book accounts, besides shares of stock in banking corporations, both state and national, but do not make any provisions for the listing of other corporate stock. Section 5584 provides for the deduction of debts from notes and credits in fixing the value upon the latter, but expressly provides that no such shall be allowed on account of any indebtedness payable upon, or for the capital stock of any corporation, or for the purchase of bonds, treasury notes or other securities of the United States not taxable, or other exempt property. The purpose of this is apparent; as corporate stock was not to be taxed separate and apart from the corporate property, it would be unfair to permit a deduction of debts for things which are not taxable by themselves, but this is not to say that the value of corporate stock is not competent to be considered by the assessor, for the purpose of ascertaining the value of the property of the corporation; to the contrary, Section 5591 makes the stock and bonds competent

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evidence of the value of the entire plant of a corporation, either foreign or domestic, while Section 5592 provides that:

"The entire business, plant or enterprise, of such corporation shall be valued as a unit, and every element, subject or consideration wherein the use is in inseparable combination with a whole, of which it forms a part, and which gives to the corporation property an added value for the purposes of income or sale, shall be considered in fixing the value for taxable purposes."

These sections are a guide to the assessor in arriving at the value of the property owned by any corporation, foreign or domestic, but contain nothing which indicates that the stock itself is to be taxed, except as covered by the property of the corporation. Section 5659 requires the assessor to make out an abstract of the assessment in his county, stating in detail certain things among which he shall set forth the total assessed valuation of all shares in banking corporations, but nowhere is it required that the abstract shall show the value of other corporate stock either foreign or domestic. This is in harmony with the proviso to Section 5687 and is further evidence that there was to be no distinction between stock in foreign and domestic corporations.

It is urged that shares of stock in a foreign corporation are the personal property of the owner separate and distinct from the capital of the corporation, for which reason they form separate and distinct subjects for taxation, and should be thus taxed at the residence of the owner. Assuming they are personal property, they are inconsequential property, they are merely tokens or evidence of ownership of an interest in corporate property or the corporation, or something of the kind unnecessary to determine. If destroyed the holder loses nothing, he is still the owner of what they purported to rep-

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resent. It is of that class of property that its *situs* for the purpose of taxation is a matter of legislative control as is also the method to be provided for its assessment. In *Tappan v. Merchants' National Bank,* 19 Wall. 490, 22 L. Ed. 189, the Supreme Court of the United States held that shares of stock in national banks are personal property, and though they are a species of personal property which in one sense is intangible and incorporeal, the law which created them could separate them from the person of their owner, for the purposes of taxation and give them a *situs* of their own. While this opinion pertains to stock in a national bank and sustains the validity of an Illinois law pertaining thereto, it recognizes that the *situs* of corporate stock for the purposes of taxation is a proper subject of legislation. At page 499, (22 L. Ed. 189) the court says:

"Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court and in the courts of Illinois. * * *

Shares of stock in National Banks are personal property. They are made so in express terms by the act of Congress under which such banks are organized. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own. * * * It is conceded that it was within the power of the State to tax the shares of non-resident shareholders at the place where the bank was located, but it is claimed that under the constitution of the State resident shareholders could only be taxed at the places of their residence.

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But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. * * *

We have not felt called upon to consider whether the General Assembly could, under the provisions of the act of Congress, provide for the taxation of shareholders at any other place within the State than that in which the bank is located. It is sufficient for the purposes of this case that it might tax them there."

In *Wright et al. v. Southwestern Railroad Co.*, 64 Ga. 783, it was held that the *situs* of stock in a railroad company whose road lies outside of the state of Georgia is in the state where the road lies, and that although held by a resident of Georgia, it was not taxable there. Later, in *Georgia Railroad & Banking Co. v. Wright et al.*, 124 Ga. 596, 53 S. E. 251, it was held that by an act of the legislature approved after the former opinion that the former decision ceased to be the law, and for the purposes of taxation that the later act fixed the *situs* of such stock held by residents of that state in Georgia, for which reason it was properly taxable there. The substance of both opinions material to the present controversy is their recognition that the *situs* of such stock for the purposes of taxation is subject to legislative control. The latest declaration of that court upon the subject appears to be in the *Georgia Railroad & Banking Co. v. Wright*, 125 Ga. 589, (54 S. E. 54), where, in commenting upon this subject, at page 595, the court says:

"The value of the shares depends upon the value

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of the property of the corporation which issues them. Their *situs* for taxation is within limits subject to legislative declaration. The legislature may have even the right under our constitution to declare that the *situs* for taxation of shares of foreign stock held by a resident of Georgia is not in Georgia, but they clearly have the power to declare that shares of such stock have a *situs* for taxation in this State."

In commenting upon the answers to be made by taxpayers, the court at page 596, (54 S. E. 55) says:

"If the question calls for the disclosure of property which has an intrinsic value and is located within this State, then of course the property must be taxed, for the constitution imperatively requires that this shall be done. If, however, there is no question which compels the taxpayer to disclose the ownership of that which has no *situs* for taxation within this State, or which has no taxable value, when there is no legislative daclaration to that effect, then the absence of the question indicates a legislative intent not to declare taxable that which has no intrinsic value, but which becomes taxable merely as a result of a law declaring it to have a taxable value."

In *Smith v. Ramsay,* 54 N. J. L. 546, 24 Atl. 445, it was held that stocks in foreign corporations owned by residents of New Jersey were exempt from taxation under the laws of that state. To the same effect are.—*State v. Bentley,* 23 N. J. L. 532; *State v. Branin,* 23 N. J. L. 484; *State, etc. v. Jones,* 38 N. J. L. 83; *De Baun v. Smith,* 55 N. J. L. 110, 25 Atl. 277; *State, etc. v. Runyon,* 41 N. J. L. 98; *Jersey City Gaslight Co. v. Jersey City,* 46 N. J. L. 194.

These cases are based upon the theory that a tax on the corporate property and on the stock of the corporation are identical, and was thus recognized by the legis-

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lature in its acts which exempt from taxation the stock of foreign corporations held by resident taxpayers.

In *People ex rel. E. E. L. Co. v. Campbell,* 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453, it was held that stocks in foreign corporations owned by residents of that state was capital employed out side the state and was not subject to taxation. In commenting at page 546, (34 N. E. 371, 20 L. R. A. 453), it is said:

"The stocks which the relator took in companies organized outside of this state stood for so much of the relator's capital, invested outside of the state. It took a portion of its capital to wit., a portion of its patent rights, and employed it outside of the state to purchase those stocks. Its property in those corporations, represented by its shares of stock was outside of this state, and was in no sense employed here. Those stocks had no *situs* here and were not taxable here under any system of taxation which has ever existed in this state."

This appears to have always been the rule in New York State.—*People ex rel. v. Commissioners of Taxes,* 64 N. Y. 541; *People ex rel. v. Wemple,* 133 N. Y. 323, 31 N. E. 238; *People ex rel. v. Wemple,* 129 N. Y. 558, 29 N. E. 812; *People ex rel. v. Commissioners of Taxes,* 11 N. Y. (4 Hun) 595; *Hoyt v. Commissioners of Taxes,* 23 N. Y. 224; *People v. Gardner,* 51 Barb. (N. Y.) 352; *People ex rel. v. Commissioners of Taxes,* 5 Hun (N. Y.) 200. The latest New York case called to our attention is *People ex rel. v. Knight,* 173 N. Y. 255, 65 N. E. 1102.

Stock in two foreign corporations was purchased by a domestic corporation by an issue of bonds, the stock was also pledged to a trust company (a resident of that state) as collateral for the payment of the bonds, held, it was not subject to tax. In commenting at page 260, (65 N. E. 1103) the court said:

"This stock was part of the relator's capital or

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general assets. Both companies are foreign corporations, the former being partly within and partly without the state and the latter entirely without the state. * * * The relator being the owner of these stocks, they constituted part of its capital, but that part of its capital was not employed within this state, and so this court has held.—(*People ex rel. Edison El. L. Co. v. Campbell,* 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453; *Peple ex rel. Edison El. L. Co. v. Wemple,* 148 N. Y. 690, 43 N. E. 170)."

The case of *State v. Kidd,* 125 Ala. 413, 28 So. 480, affirmed by the Supreme Court of the United States (188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669), recognizes that the *situs* of corporate stock for the purposes of taxation is a matter that can be fixed by legislation; its holding is that unless fixed by statute its *situs* for the purposes of taxation is at the domicile of the owner. Other cases which sustain our conclusion in this respect are.—*Dundee Mortgage, etc., Co. v. School Dist. No. 1* (C. C.) 19 Fed. 359; *Savings & Loan Society v. Multnomah Co.,* 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803; *Mumford v. Sewall,* 11 Or. 67, 4 Pac. 585, 50 Am. Rep. 462; *Pullman's Car Co. v. Pennsylvania,* 141 U. S. 19, 11 Sup. Ct. 876, 35 L. Ed. 613; *Coe v. Errol,* 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Common Council v. Assessors,* 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; Thompson's Commentaries on Corporations, vol. 2, § 2846; *Chesebrough v. City and County,* 153 Cal. 559, 96 Pac. 288; *Gillespie v. Gaston & Thomas,* 67 Tex. 599, 4 S. W. 248.

We are not intimating that the state cannot tax stocks of foreign corporations held by its residents and eliminate it from that of domestic corporations except as it is burdened by the taxes upon the property of the corporation; that question is not before us. In some states

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such laws have been sustained but the cases thus holding are based upon statutes to that effect, or to the absence of any statute fixing their *situs* when they are made the subject of taxation by either constitutional or statutory provision.—*State v. Kidd,* 125 Ala. 413, 28 South. 480; *Kidd v. Alabama,* 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; *Wright v. Louisville & Nashville R. R. Co.,* 195 U. S. 219, 25 Sup. Ct. 16, 49 L. Ed. 167; *Bradley v. Bauder,* 36 Ohio St. 28, 38 Am. Rep. 547; *Lee, Treas., v. Sturges,* 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556; *Sturges v. Carter, Treas.,* 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240; *San Francisco v. Fry,* 63 Cal. 470; *San Francisco v. Flood,* 64 Cal. 504, 2 Pac. 264; *Seward v. City of Rising Sun,* 79 Ind. 351; *Commonwealth v. Lovell,* 125 Ky. 491, 101 S. W. 970.

We cannot agree that the proviso to section 5687, *supra,* when applied to stocks of foreign corporations is in conflict with the constitution wherein it provides that all laws exempting from taxation property other than that mentioned, shall be void. Stocks in foreign corporations are no more potential than those in domestic corporations, and if this section conflicts with the constitution when applied to stocks in foreign corporations, it must in many cases fall when applied to those in domestic corporations. In addition to the authorities which hold that for the purposes of taxation the *situs* of stock in both foreign and domestic corporations is a matter which can be regulated by legislation, others disclose that such regulations are in no sense an exemption of any property from taxation. It is common knowledge that when our present revenue law was enacted, we had in this state, and probably always will have, many domestic as well as foreign corporations, with all their property within the state, many domestic corporations with practically no property within the state, others of each class with

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part of their property within, and part without the state. The stocks of some of these corporations, both foreign and domestic, are all held by residents of this state; in others, all by non-residents; in others, part by residents and the remainder by non-residents. It follows that if the failure to tax the stock of a foreign corporation held by residents would create an exemption within the meaning of the constitution because it has no property within this state, it would apply as well to the stock of a domestic corporation when its property is without the state. Other illustrations could be made which disclose the unjustness of such a position in making it double taxation, etc., for instance, where the property of a foreign corporation is all within this state; in such case, when the stock is owned here, taxes would be paid upon both, while the domestic corporation and its stockholders residents of this state with practically all its property without the state, would pay no taxes upon either its stock or property in this state and only upon its property in the foreign jurisdiction.

Our constitution provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal. If the position that Section 5687, *supra*, creates an exemption when applied to stock in a foreign corporation is correct, it would equally apply to stock in many domestic corporations for city and county taxes. Stocks owned by a resident of one city and county, when the domestic corporation and all its property is situate in another city and county, is not taxed to the owner at the city and county of his residence, and pays no taxes there for city and county purposes. If the corporation and its prop-

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erty are situate outside of any city, although the owner of the stock is a resident of a city, he pays no city tax thereon at all, and while we concede that the limits of a city or county are different from state lines, yet to this extent, if it is an exemption of personal property prohibited by the constitution, the result would be the same when applied to such local taxes; but we cannot agree that it is an exemption within the meaning of the constitution. Counsel overlook the latter part of this section wherein it provides that the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal. This is what the legislature has attempted by providing that corporate stock shall be deemed to represent corporate property, etc. This is a regulation for the purposes of taxation and is of that class contemplated by the constitution.—*Stanley v. Little Pittsburg M. Co.*, 6 Colo. 415; *Arapahoe County v. Printing Co.*, 15 Colo. App. 189, 61 Pac. 494; *Carlisle v. Pullman Co.*, 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553; *Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060; *Taxation of Mining Claims*, 9 Colo. 635, 21 Pac. 476; *People ex rel. v. Henderson*, 12 Colo. 369, 21 Pac. 144; *Ames v. People*, 26 Colo. 83, 56 Pac. 656; *American Refrigerator Co. v. Adams*, 28 Colo. 119, 63 Pac. 410.

A somewhat similar regulation is that which provides for the deduction of debts from credits in the case of the individual taxpayer. Such deductions might be considered as meaning an exemption, but it has generally been accepted as constitutional, as being a classification or regulation combining the personal assets and liabilities of the taxpayer for the purposes of taxation. This provision has been upon our statute books ever since as well as before the adoption of the constitution, and has been recognized as a valid and existing law in the levying

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and assessment of taxes.—*Arapahoe County v. Fidelity Savings Assn.*, 31 Colo. 47, 17 Pac. 376; *Chase v. Board of Commissioners*, 37 Colo. 268, 46 Pac. 1011, 11 Am. Cas. 483.

Other courts have held that it does not constitute an exemption within the meaning of a constitutional provision similar to ours.—*Savings & Loan Society v. Multnomah*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803; *Florer v. Sheridan*, 137 Ind. 28, 36 N. E. 365, 23 L. R. A. 278; *Loan & Homestead Ass'n v. Keith*, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65; *Daly Bank, etc., Co. v. Board of Commissioners*, 33 Mont. 101, 81 Pac. 950.

For the purposes of taxation the constitution compels the combining of certain classes of properties wherein it provides that:

"Ditches, canals and flumes owned and used by individuals or corporations, for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes."

Is there any more reason why ditches, etc., should not be separately taxed than that the stock of a corporation, which in a sense represents its property, should be? We do not think so, and in our opinion to so hold would in part be to destroy the principle or classification to secure just valuations provided for by article X, section 3 of the constitution which was attempted to be followed by the enactment of this section.

The question of exemption of stocks was urged in *Jersey City Gaslight Co. v. Jersey City*, 46 N. J. L. 194. In reply the court, at page 196, in part said:

"Though the provision of the act of 1866, that the stockholders shall not be so taxed for the stock, has been characterized as an exemption, it is not such in any sense. It is merely a declaration of the intention of the

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legislature that the property of the corporation being taxable in the hands of the company shall not be again taxed in the hands of the stockholders. A provision so manifestly just will not be held to be repealed unless the intention to repeal it is clearly apparent."

In *Appeal of Fox and Wife,* 112 Pa. St. 337, 34 Atl. 149, it is held that a tax upon the capital stock of a corporation is a tax upon its property and assets. At page 354 4 Atl. 154, the court says:

"It has been repeatedly decided in this state and is settled law, that a tax upon the capital stock of a corporation is a tax upon its property and assets. * * *

We do not think the Act of 1885 is unconstitutional, because it does not impose the tax on mortgages upon corporations."

In Re St. Louis Loan and Investment Co., 194 Ill. 609, 62 N. E. 810, involved a statute which provided for the assessment of the shares of stock in such associations to the stockholders, and the real estate to the association; the assessor, in addition, attempted to assess the notes and mortgages held by the association. It was held that the act was not unconstitutional, and that it was not an exemption of property from taxation or assessment to not include the notes and mortgages. In commenting at page 616, the court said:

"We can see no reason why the legislature may not select this method of assessment, and provide, as it has, that outside of the real estate the assessment of the capital stock shall be deemed to be the assessment of the property of the association. This can not be said to be an exemption of property from taxation or assessment, but simply the selection of one of two methods subjecting the assets of such association to the public burden. Such being our view, we hold that the board of review was not authorized to assess the notes and mortgages

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of appellant at the time and manner shown in this case, and such assessment is set aside and held for naught."

The case of *Chesbrough v. City and County,* 153 Calif. 559, 96 Pac. 288, discloses that the California Constitution then under consideration defined property as including corporate stock, yet for the purposes of taxation it was held that to the extent that the property of the corporation is situated, in that state, it is not to be taxed. To put it another way, it was held that the tax upon the property was corporate to the exent of its value, and is presumed to be the tax upon the stock.

In *Loan & Homestead Association v. Keith,* 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65, in commenting upon this subject, at page 620, (39 N. E. 1075, 28 L. R. A. 65), the court says:

"While it may be conceded that the interest of a corporation in the corporate property, and the interest of the stockholder in the corporation, are separate interests, yet in reality they both represent one thing,—the money invested in the corporation by those who organized and created it. It would therefore be manifestly unjust to impose a tax on the corporation itself, and at the same time impose a tax on the shares of stock. Such a course would, in effect, require money invested in a corporation to pay double taxation. * * * In view of these facts, the legislature, under the power conferred by the constitution to regulate the manner of ascertaining the fair valuation of property subject to taxation and the mode to be adopted in the assessment, has provided by general law, that the whole assessment shall be made against the corporation. In doing this the legislature did not intend to exempt any property from taxation, and no property was exempt from taxation."

In *Stroh v. City of Detroit,* 131 Mich. 109, 117, 90 N. W. 1029, 1032, it is said:

"We do not feel called upon to ignore the plain

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meaning of our Constitution by carrying the principles that the corporation and its shareholders are different persons, and the corporate property and the shares different property, so far as to say that the taxing of both is not double taxation in the common acceptation of the term or in the sense of the Constitution."

In *Georgia Railroad and Banking Co. v. Wright,* 125 Ga. 589, at page 600, 54 S. E. 52, 57, the court says:

"A share of stock in a corporation has no inherent or intrinsic value. The General Assembly may declare that for the purposes of taxation it shall have that value which the owner may derive from it in the markets of the world. The General Assembly can not make it a subject of taxation at an arbitrary value; but if it is a thing which can be bought and sold upon the market, it is within the authority of the law making power to declare that for the purposes of taxation it shall be treated in the hands of the owner as of the value which it would command in the market. When that which gives it value has been taxed, the General Assembly is not required, under the constitution, to tax it again through the medium of the shareholder."

Other cases in principle, which sustain our conclusion in this respect are.—*Commonwealth v. American Car Co.,* 203 Pa. St. 302, 52 Atl. 326; *Germania Trust Co. v. San Francisco,* 128 Calif. 589, 61 Pac. 178; *Chassaniol v. Board of Assessors,* 120 La. 777, 45 So. 604; *State v. St. L., K. C. & N. Ry. Co.,* 77 Mo. 202.

It follows that the combining of the share of the capital stock of a corporation and its corporate property for the purposes of taxation whereby all are taxed as a unit, can in no rational or logical way be construed into meaning an exemption of any property from taxation.

The judgment is affirmed.

Affirmed.

Decision *en banc.*

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[No. 7747.]

SAGARA V. CHICAGO, ROCK ISLAND & PACAFIC RAILWAY COMPANY.

1. RAILWAY COMPANY—*Duty Towards Trackmen.* A railway company is under duty to provide that when a train approaches a gang of track repairers it shall give them a signal, in reasonable time, so that they may get out of its way. (239, 240)

2. NEGLIGENCE—*Railway Company—Injury to Trackman.* A track repairer, engaged in repairing track, was run down and seriously injured by defendant's train. The train was running slowly and might have been stopped within twenty-five or thirty feet. There was evidence that the bell was not rung, nor the whistle sounded, that the track repairer was in plain view, but that the engineer was looking to the rear of his train. *Held* that the evidence was sufficient to convict the railway company of negligence, and that the question should have been left to the jury. (240)

3. CONTRIBUTORY NEGLIGENCE—*Railway Trackman.* One employed in the repair of the tracks of a railway where trains are frequently passing is under duty to keep such lookout as a reasonably prudent man would do under like circumstances. The circumstances of the particular case control. It is not to be determined as matter of law how often he must look about him. (241)

Plaintiff was one of a group of men employed in repairing the track of a railway, and while so employed was run down and seriously injured by defendant's train. He testified that he was not aware of the approach of the train; that no signal was given; that he knew that trains were likely to pass, and that it was his rule to look for an approaching train at intervals of from one to ten minutes. Some of the party were still at work upon the tracks, at the time of the injury, and next previous thereto. The train came from the north and was moving slowly with little noise; plaintiff was facing to the south. The work in which he was employed occasioned some noise, and a train upon another track nearby was passing at speed. *Held* that the question of contributory negligence should have been left to the jury. (241, 242)

4. ——*Last Clear Chance.* It appearing that the engineer, if he had looked, must have seen the plaintiff in his exposed position, while still at a considerable distance from him, and that the train might have been stopped within twenty-five or thirty feet, it was *held* that

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even if plaintiff were convicted of contributory negligence, he was entitled to recover under the approved doctrine of Last Clear Chance. (242, 243)

Error to Denver Distrct Court.—Hon. H. C. RIDDLE, Judge.

MESSRS. STARK & MARTIN, for plaintiff in error.

MR. WILLIAM V. HODGES, MR. MASON A. LEWIS and MR. PAUL E. WALKER, for defendant in error.

MR. JUSTICE SCOTT delivered the opinion of the court:

The plaintiff was an employe of the Denver & Rio Grande Railroad Company, and working as one of a gang of trackmen upon the tracks of said company, about one mile, north of a station named Pinyon, between the cities of Colorado Springs and Pueblo.

The defendant, The Chicago, Rock Island and Pacific Railway Company operates its trains between the said cities over the tracks of the Denver & Rio Grande Company. The train that caused the injuries complained of, was proceeding from Colorado Springs in a southerly direction toward Pueblo. The plaintiff was at the south end of the squad of men, working on the track. The line of men extended a distance of about three hundred feet, the plaintiff being at the extreme south end of this line. The engine of the train struck the plaintiff, causing severe injuries, including the crushing of one of his legs so that amputation became necessary. At the close of plaintiff's testimony, the court directed a verdict for the defendant, company. Upon this ruling the case is before us for review. The grounds upon which the motion for a directed verdict was based, were: that no negligence whatever appears upon the part of the defendant; that the testimony shows the plaintiff to

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have been guilty of contributory negligence; and that the injury arose out of the risks assumed by the character of the employment.

It appears that the train had slowed down as it approached the trackmen, and when at a point about one hundred feet north of the foreman, who stood at the north end of the line of workmen, the latter gave the engineer a signal to proceed. At the time the engine struck the plaintiff, the train was moving at a speed of about five miles per hour. The plaintiff was at the time of the accident facing the south with his back to the approaching train, engaged in spacing and adjusting ties, in a stooped position, working with a shovel, and standing between the rails. A fellow-workman who was also injured, was working with plaintiff and engaged in spiking the rails to the ties as these were adjusted by the plaintiff.

The testimony shows this work occasioned some noise, and also, that there was at the time a fast moving train passing upon the track of another railroad, about two hundred feet distant, and moving in an opposite direction to that of the train in question.

The plaintiff testifies that he was not aware that the train was approaching prior to the injury; that no bell was rung, nor whistle blown, nor other warning of its approach. The train was moving on a down grade of about one-half of one per cent, and consisted of an engine, eight freight cars and caboose. A locomotive engineer who had run over the track for many years testified that such a train, at the rate of speed given, running in that direction and at that point, could have been stopped from within twenty-five to thirty feet. It appears that the train did proceed about two hundred and fifty feet after striking the plaintiff.

One of the workmen, an interpreter, testified that

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after the foreman gave the signal, he called out to the men, but the plaintiff did not hear him, and it does not appear that he was sufficiently near to hear the call.

The plaintiff says that he has worked in the same capacity for some time, knew that trains were likely to pass and also, that it was the rule and custom for engineers to blow the whistle and ring the bell on approaching the workmen, and that it was his rule to look for approaching trains at intervals of from one to ten minutes. The court however, struck out the testimony as to the custom of engineers, on the theory that the plaintiff was not an employe of defendant company.

There appears to be a plain view of the track for at least a mile north of the point where plaintiff was injured, and two of the witnesses say they saw the train at a point several hundred feet north of where the men were working, but these witnesses were not nearer plaintiff than one hundred and fifty feet, and to the north of him.

The court refused to permit witnesses other than the plaintiff, to testify that the whistle was not blown or the bell rung, before the accident, but suggested that such testimony would be proper if it could be shown that the warning was given before the foreman signalled the engineer.

Just why such distinction should be made is not clear, and particularly in a case where no warning was given at all. If it was the duty of the engineer to give warning at all it was his duty to do so at any point within reasonable time. A witness named Ono testified that he was about one hundred and fifty feet north of plaintiff, and that when the engine came within about 150 feet of him, the engineer turned around and looked the other way, and was still looking backward when the engine passed him.

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The train was running slowly on a downward grade, and therefore it could not have made much noise in the matter of the movement alone. The signal given to the engineer could mean only that the track, then being repaired, was in such condition as the train might pass over it. The workmen, or at least a part of them, were still at work on the track. No whistle was blown, no bell was rung or other warning given, and the engineer himself, from the time he reached the squad of men until he reached a point midway between the northerly and southerly ends of the gang of men, or a distance of about one hundred and fifty feet at least, and possibly until the plaintiff was struck, was looking backward and thus clearly guilty of a violation of his duty. That he could have stopped his train at any time within a distance of twenty-five to thirty feet, coupled with the fact that he did not stop the train until it had passed a distance of two hundred and fifty feet after striking the plaintiff; all this is sufficient evidence of negligence as to impose the clear duty upon the court to submit that question to the jury. The duty of a railway company under such circumstances is stated by Judge Thompson to be:

"It is the manifest duty of a railway company to provide that, when a train approaches a group of track repairers engaged in their work, it shall signal them to the end that they may get out of the way. The reason is plain to judges who are desirous of justice and right. A squad of railway laborers will not be able, while attending closely to their duties, to keep a strict lookout for approaching trains; but absorbed in the performance of those duties, bent down, watching the track, shoveling gravel or driving spikes a rapidly moving train may come upon them without their being aware of its presence in time to step aside for it to pass. On the other hand,

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the servants of the company in charge of the train are driving the instrument of danger, and there is a manifest duty on their part to keep a constant lookout to the end of protecting from danger all persons who may be lawfully on the track, and of warning them in time to enable them to avoid being run over."—Thompson on Negligence, Sec. 4488.

This doctrine seems not only to be sound, but is well sustained by the authorities. Under the state of facts presented the court cannot say as a matter of law, that the plaintiff was guilty of contributory negligence.

Without doubt; it was the duty of the plaintiff to have kept such lookout for the approach of trains as is consistent with the duty of a prudent man similarly situated.

The plaintiff testifies that he looked for approaching trains at intervals of from one to ten minutes. Whether this, under all the circumstances was sufficient or whether it constituted negligence, was a question of fact for the jury, and not a conclusion of law for the court.

It was held in *Smith v. Southern Pacific Co.*, 58 Ore. 22, 113 Pac. 41, Ann. Cas. 1913 A, 434 that where a railroad trackman is working on a track which is being used for the passage of trains, it cannot be determined as a matter of law how often he is required to look in order to fulfill the duty of ordinary care; that being a question for the jury.

It was further said in that case, that where a railroad trackman was engaged in repairing the track under such circumstances as would justify him in assuming that ordinary care would be observed to warn him of approaching danger, he was only required to exercise such care and vigilance in discovering the peril and avoiding the injury as was consistent with the performance of

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the work in which he was engaged. To the same point *St. L., I. M. & S. Ry. Co. v. Jackson,* 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646, 8 Ann. Cas. 328; *Schultz v. C., M. & St. P. Ry. Co.,* 57 Minn. 271, 59 N. W. 192; *Shoner v. Pennsylvania Co.,* 130 Ind. 170, 28 N. E. 616, 29 N. E. 775.

The decree of care to be observed by a trackman in such cases must be determined by the facts and circumstances of the particular case. As for instance, if working in the yards of a railroad company where switch engines are constantly moving over the tracks, then the workman would necessarily be held to a stricter degree of care, than if working along a line of track over which trains pass only occasionally. The question of contributory negligence in this case was clearly for the jury, under proper instructions.

But if contributory negligence in this case should be conceded, then under the testimony, the question of the last clear chance is entitled to consideration and determination by the jury.

The engineer received the signal of permission to pass over the track then being repaired, when about four hundred feet from the plaintiff. It was in the day time. There was a clear view of the track and all the workmen upon and about it at the time. There appears to be no time after receiving the signal, that the engineer could not by the exercise of reasonable care, have seen the plaintiff in his perilous position, to have stopped his train at any time within twenty-five to thirty feet, but that he did not stop it until it had proceeded two hundred and fifty feet after striking the plaintiff, tends to confirm the testimony of the witness that the engineer was looking backward at least a part of the time, and also, to justify the inference that he did not see the plaintiff until after the accident, all of which, if true,

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constitutes such neglect of duty as will entitle the plaintiff to recover.

Counsel for defendant attack vigorously, the doctrine of the last clear chance, as announced by this court in the case of *The Denver & Rio Grande Company v. Buffehr,* 30 Colo. 27, this doctrine has been repeatedly reaffirmed and reiterated by this court, the last reported case upon that subject being that of *Catlett v. Colorado Southern Co.,* 56 Colo. 463, 139 Pac. 14. This rule is reasonable and humane and is so well settled in this jurisdiction that we must decline to further consider it.

The contention of defendant in error, that facts are not sufficiently pleaded to entitle the plaintiff to recover under this rule, is not justified by an examination of the pleadings.

The judgment is reversed and the case remanded.

MUSSER, C. J. and GABBERT, J., concur.

[No. 7773.]

BIDDLE v. NEWMAN.

1. SURVEYS—*Monuments.* When the place at which the surveyor subdividing the public lands for the government placed a stone to mark a section corner can be ascertained, that point is the corner. (244)

2. EVIDENCE—*Opinions.* The opinion of a single witness, not supported by any reason, that a particular stone found by him, many years before controversy arose, was a section corner, rejected. (245)

Error to Morgan District Court.—Hon. H. P. BURKE, Judge.

Mr. JAMES E. JEWELL, for plaintiff in error.

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Messrs. STEPHENSON & STEPHENSON, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

This writ of error brings up for review, a judgment of the district court establishing the corner common to sections five and six, township three, north, and sections thirty-one and thirty-two, township four, north, range fifty-eight, west, in Morgan County. The action was prosecuted under the provisions of Chapter XXIV Code 1908. A commissioner was appointed who took testimony, examined the ground, made a survey and reported to the district court. Exceptions to the report were filed, heard and overruled. The report was approved and the corner as therein located was established by the decree. The case presented to this court in the briefs involves only the evidence and what was proved thereby. The plaintiff in error contends, with which contention the defendant in error and the district court agree, that where the government surveyor placed a stone or other monument to mark a corner, and the point where it was placed can be located, that point is the corner. The plaintiff in error seems to contend that her evidence shows conclusively, or by a preponderance, that the government surveyor placed a stone as called for in the field notes to mark the disputed corner at the point where she alleged the corner was. If this were so, the corner ought to have been established at that point. The commissioner and the court, however, took a different view of the evidence from that taken by the plaintiff in error. After reading and carefully considering all the evidence, which it would be unprofitable to analyze at length in an opinion, we are impressed that the district court was correct in the findings it made.

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There was some evidence that a corner stone had been found at the point which the plaintiff in error claimed was the corner. It appears to us that, aside from the testimony of one witness that was too vague and indefinite to be considered, the one time existence of a corner stone at that point was indicated by an opinion of one witness who had made a survey many years before on the township line. This opinion, which was no doubt an honest one, was really unfortified by any good reason. The testimony did not identify the stone as a corner monument by any of the indicia that go to identify such a monument. The other witnesses based their conclusions on this opinion.

When all the evidence is considered direct, circumstantial and inferential, it leaves a distinct impression upon the mind that the stone was not a corner monument. The district court found that it was not, by finding that from the evidence the corner was a lost corner, as the court termed it. The rule, that courses and distances must yield to monuments when identified, was not violated by the court, as contended. The court held that the corner stone called for in the field notes was lost, and in the absence of such monument, proceeded to establish the corner from the best evidence at hand. No sufficient reason appears for disturbing the conclusion reached. The judgment is affirmed.

Judgment affirmed.

Mr. JUSTICE GARRIGUES and Mr. JUSTICE SCOTT concur.

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[No. 7778.]

BOARD OF DIRECTORS OF THE YELLOW JACKET IRRIGATION DISTRICT ET AL. v. WESSELS.

1. PLEADINGS—*Striking from the Files.* That portions of a pleading are impertinent or irrelevant is no ground to strike out the whole pleading. (248)

2. MANDAMUS—*Judgment Upon the Pleadings*, without hearing proofs is error.—*Parr v. Sexson* 56 Colo. 491, followed. (249)

3. PARTIES—*Necessary.* Mandamus to compel the directors of an Irrigation District to deliver certain warrants of the district, to which the plaintiff claims to be entitled, must join the district. (249)

Error to the Routt District Court.—Hon. JOHN T. SHUMATE, Judge.

Mr. J. K. BOZARD, Mr. W. B. MCCLELLAND, and Messrs. MORRISON & DE SOTO, for plaintiff in error.

Mr. JOSEPH C. HELM, Mr. HARRY E. KELLY, Mr. CHARLES H. HAINES, and ARTHUR L. WESSELS, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The record presented in this case is the most delightfully unintelligible, incomprehensible and inexcusably complicated compilation of alleged court proceedings possible of conception. There are numerous and lengthy briefs containing allegations and arguments as to what the record does or does not show, together with myriads of citations of authority upon technical questions, none of which should have been raised or considered in the case.

The pleadings and proceedings, as appearing in the disputed record thereof, and the many briefs filed, are

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masterpieces in the matter of seeming effort to keep from this court any clear understanding of the merits of the controversy. Sufficient however appears, so that we can gather that there was an organized irrigation district under the laws of this state, named the Yellow Jacket Irrigation District, with M. M. Nay, John Summer, Jr., and James E. McKinnis constituting its board of directors. That this corporation employed by written contract the defendant in error, as its engineer. The duties and compensation of such engineer were: "to make and perform and to furnish all the labor and services, professional and otherwise, also all material necessary, incidental and pertaining to engineering work, as shall be necessary to estimate the cost of The Yellow Jacket Irrigation ditch or canal, also as shall be necessary to determine the number of acres subject and susceptible of irrigation within the said district and included therein, and to determine and establish definitely the boundaries of said The Yellow Irrigation District, and to furnish to the said district an estimate of the cost, on or before December 1, 1910, of said canal or water system complete, including water rights, and all things, expenses, costs, necessary for a complete water system of irrigation, and the cost per acre for each acre within said district. And the party of the first part covenants and agrees to pay to the said party of the second part thereof four (4) per cent of the cost or estimated cost of the water system of The Yellow Jacket Irrigation District."

That the plaintiff below contends that he performed the services required by this agreement and that by reason thereof he was entitled to receive from the defendant the sum of $8,000 in District Warrants for such services under the terms of the agreement.

That his services and report thereof were approved and accepted by the corporation. That warrants were

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issued to the plaintiff in the total sum of $4,160 in part payment of his services, but that the corporation and its officers refused to deliver such warrants thereafter to the plaintiff.

Further, that the corporation and its officers refused to issue or deliver warrants for the additional sum due under the contract in the total sum of $3,840.

This much appears from the petition for an alternative writ of mandamus. This petition is a marvel of its kind and sets out what is presumably intended to be the evidence in the case in great detail, including copies of the minutes of the meetings of the board of directors of the corporation.

After service of the alternative writ, the individual defendants as directors, filed an answer or return to the writ. This answer in the matter of detail and in the pleading of evidence, is as remarkable as the petition. The court, presumably because of objections to the method of signing the answer or in not signing it at all, and because of the form and method of verification, upon motion of plaintiff entered an order striking the answer from the files, but permitting defendants to file an amended return.

This was done accordingly and thereafter upon motion of plaintiff the amended answer was stricken from the files and the defendants denied the right to file another or amended answer.

The action of the court in this respect was inexcusable, for the defendants were thereby denied their day in court. While the answer or return, as well as the petition, were clearly subject to motions to strike many portions thereof, and to make more specific and certain, there was no sufficient reason to strike either pleading as a whole.

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The record discloses a labyrinth of motions, demurrers, motions to strike motions, and other like pleadings, but it can serve no good purpose to discuss them, for it would be a waste of the time of the court, and to do so would exhaust a volume of our reports.

The case was finally disposed of upon a motion of the plaintiff for judgment on the pleadings. This judgment was rendered without a hearing, and without proof, save and except upon the question of damages, which are based upon the report of a referee. This was clearly error, and of itself compels a reversal of the judgment.

This question was fully discussed and determined in the case of *Parr v. Sexson,* 56 Colo. 491, 138 Pac. 7687, where Mr. Justice Bailey, speaking for the court, said:

"The record here affirmatively shows that a default was entered against the defendant, and that a judgment thereon without a hearing or the taking of testimony was awarded, making the alternative writ peremptory, and entering a money judgment as for damages against the defendant for $50.00. Such default judgment was entered in direct conflict with the specific provision of the code, that the writ shall not be granted by default, and that in mandamus the case shall be heard by the court or judge whether the adverse party appear or not, and was therefore improper and unwarranted. For this reason the judgment must be reversed."

It was held by the court of appeals, when this case was there pending, that the corporation was not a party to the suit.—*Yellow Jacket Directors v. Wessels,* 21 Colo. App. 457, 122 Pac. 400. Just how the matters involved here can be fully or finally determined without making the corporation a party to the action is not plain.

The judgment is reversed and the cause remanded with instructions to the court to permit the parties to make the corporation a party to the proceeding, with

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proper notice, and to amend the pleadings as they may be advised, and to try the cause upon its merits.

MUSSER, C. J. and HILL, J., concur.

[No. 7798.]

THURINGER, ADMINISTRATOR V. TRAFTON ET AL.

1. FRAUDULENT CONVEYANCES—*Who is a Creditor.* One who has sustained a personal injury by the negligence or misconduct of another is a creditor of the offending party, within the meaning of Rev. Stat. Sec. 2671, even though his claim has not been reduced to judgment. (253)

2. HUSBAND AND WIFE—*Conveyances Between—Presumptions.* Where a debtor conveys lands to his wife when he is insolvent, or by the transfer is made insolvent, and the conveyance is assailed by a creditor, the husband and wife have the burden to establish by a clear and satisfactory proof that the conveyance was for a valuable consideration, and without intent to hinder, delay or defraud the creditors. General statements of the wife that her money purchased the land in question, without reference to any record or source of information by which they may be verified, will not suffice. As against a creditor the law will not uphold a conveyance by an indebted husband to his wife, where the transaction is shrouded in mystery and doubt. The evidence examined and held entirely insufficient to support the conveyance. (254, 256)

3. APPEAL AND ERROR—*Findings manifestly against the Weight of Evidence* will be set aside. (254)

4. ——*Findings On Conflicting Evidence*, are not controlling upon the court of review, where the conflict is internal in the evidence of the successful party, and not between that and the testimony of any other witness. (255, 256)

Error to Arapahoe District Court.—Hon. CHARLES MCCALL, Judge.

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Messrs. MELVILLE, SACKETT & CALVERT, for plaintiff in error.

Messrs. CRUMP & ALLEN, for defendants in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

STATEMENT OF THE CASE.—September 8, 1908, defendant in error, Edwin B. Trafton, sold a tract of land in Idaho upon which he and his wife had resided fifteen years, for $4,500.00 cash, and on the same day he and his wife left for Denver, where they arrived on the 12th. On the 14th of September, 1908, he deposited to his credit in the Denver National Bank, an Idaho bank draft for $4,275.00, which he had purchased with the proceeds of the sale, which was the only deposit he made in that bank. Soon after his arrival in Denver, he purchased two tracts of real estate, one in Denver, the other in Arapahoe county, paying for the latter with a check drawn against the account in the Denver bank, both deeds being taken in his name and recorded.

November 23, 1908, John Thuringer was seriously injured by an automobile driven by Edwin B. Trafton, and a few days later his son visited the Trafton home at Littleton for the purpose of adjusting the damages to his father caused by the injuries, but finding no one at home returned to Denver, and on the way met Trafton's wife. The conversation with her which followed being unsatisfactory to him, he told her that an action for damages would be instituted. December 4, 1908 Trafton deeded both tracts of land to his wife, gave a bill of sale of his automobile to his mother, withdrew his balance amounting to $1,760.00 from the Denver bank, and opened an account in the Englewood bank in his wife's name, which he checked against as her agent; thus disposing of all his property.

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December 24, 1908, suit was commenced by John Thuringer against Edwin B. Trafton who told the officer serving the summons that he would not defend the suit; that if they thought they could get anything out of him, to go to it, they were welcome to all they could get; that he was pretty smart and could take care of himself. Mrs. Trafton heard this conversation. Thuringer obtained judgment against Trafton for $2,500.00, and thereafter such proceedings were had that the lands deeded by Trafton to his wife were sold upon execution to satisfy this judgment, Thuringer being the purchaser and in due time receiving and recording sheriff's deeds to the property. Trafton told the officer who made the levy he was only wasting his time, that the property had already been taken care of.

This action was brought July 23, 1910 by Minnie E. Trafton to remove the cloud caused by the sheriff's deeds, from her recorded warranty deed title, and on motion of Thuringer, Edwin B. Trafton was made a party, who, Thuringer alleged in his cross complaint to be the real owner of the lands in controversy; further alleging that he had voluntarily, without consideration, and with a view of concealing the title and to hinder, delay and defraud creditors, conveyed the property to his wife, which conveyances were sham and fictitious, all of which she well knew. He asked that the deeds made by Trafton be declared fraudulent and void, that he be declared to be the real owner of the property and that a decree be entered for its conveyance to Thuringer.

The trial was to the court without a jury, and on March 15, 1912, it found plaintiff, Minnie E. Trafton, to be the owner in fee simple of the land in controversy; that defendant's cross-bill was without merit; that the sheriff's deeds to Thuringer were void and a cloud upon plaintiff's title; that defendant had wholly failed to sus-

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tain the allegations of fraud; it cancelled the sheriff's deeds, and decreed plaintiff to be the owner of the premises. To review this judgment, Thuringer's representatives brings the case here on error.

1. THE LAW.—The simple fact that plaintiff in error had not reduced his cause of action to judgment before Trafton made the transfers to his wife, is immaterial. At that time he was a creditor within the meaning of section 2671, R. S., which provides in substance that every conveyance of any interest in land made with intent to hinder, delay or defraud creditors, shall be void. The object of this statute is to protect creditors, and it makes no difference whether their claims have been reduced to judgment or not, at the time of the conveyance.—*Gregory v. Filbeck,* 12 Colo. 379, 21 Pac. 489; *Mulock v. Wilson,* 19 Colo. 296, 35 Pac. 532; *Fahey v. Fahey;* 43 Colo. 354, 96 Pac. 251, 18 L. R. A. (N. S.) 1147, 127 Am. St. Rep. 118; *House v. Johnston,* 19 Colo. App. 524, 76 Pac. 743; *Lowentrout v. Campbell,* 130 Ill. 503, 22 N. E. 744.

2. In our state husband and wife may each own property just as separate and distinct from the other, as they could if not married, may conduct business transactions concerning it, and make conveyances, one to the other, the same as if dealing with third persons. But the relationship between them is so intimate and confidential that when a debtor conveys property to his wife when he is insolvent, or if the transfer will render him insolvent, or prevent creditors from collecting their claims, and the conveyance is impeached or attacked by creditors, then the husband and wife are obliged to establish on the trial by clear and satisfactory evidence, the honesty of the transaction; that it was made in good faith for a valuable consideration and without intent to hinder, delay or defraud creditors. If they fail to do

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this, the conveyance will be set aside.—*Helm v. Brewster,* 42 Colo. 25, 93 Pac. 1101; *Tibbets v. Terrill,* 44 Colo. 94, 96 Pac. 978, 104 Pac. 605; *First Nat. Bank v. Kavanagh,* 7 Colo. App. 160, 43 Pac. 217.

3. The finding of a trial court is not necessarily binding on a court of review when it clearly appears from the whole record that such finding is wrong. The power of a court of review ought not to be left paralyzed so as to prevent a miscarrage of justice, merely by the erroneous findings of a trial court or the verdict of a jury. We have never refused to set aside such a verdict or finding when it is manifestly against the weight of the evidence and would result in a miscarriage of justice. —*Petite v. People,* 8 Colo. 518, 9 Pac. 622; *Caldwell v. Willey,* 16 Colo. 169, 26 Pac. 161; *Nix v. First Nat. Bank,* 23 Colo. 511, 48 Pac. 522; *Rhode v. Steinmetz,* 25 Colo. 308, 55 Pac. 814; *D. & R. G. Co. v. Peterson,* 30 Colo. 77, 69 Pac. 578, 97 Am. St. Rep. 76; *D. & R. G. Co. v. Vitello,* 34 Colo. 50, 81 Pac. 766; *Shulze v. Shea,* 37 Colo. 337, 86 Pac. 117; *Rankin v. Cardillo,* 38 Colo. 216, 88 Pac. 170; *Wachsmuth v. Heil,* 1 Colo. App. 196, 28 Pac. 17; *Abbott v. Smith,* 3 Colo. App. 264, 32 Pac. 843; *Lamar Co. v. Craddock,* 5 Colo. App. 203, 37 Pac. 950; *Smith v. Ellison,* 6 Colo. App. 207, 40 Pac. 502; *Brinker v. U. P., D. & G. Ry. Co.,* 11 Colo. App. 166, 55 Pac. 207.

4. CONCLUSION.—Tested by the foregoing rules, the court's finding was unwarranted and cannot be sustained. It should have found the deeds from Trafton to his wife void, cancelled them and entered a decree in accordance with the prayer of the cross complaint. The question is whether the property belonged to Edwin B. Trafton and was conveyed to his wife for the purpose of defrauding creditors. Love and affection as a consideration, or gift, is not involved. She claims her money purchased the premises; that he conveyed the Denver

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property to her in payment of a loan; that she purchased the Arapahoe county property and paid for it herself, and her husband in transacting the business took and recorded the deed without her knowledge, in his name. The evidence shows that the owner of the Arapahoe county property sold it to Mr. Trafton, who paid the purchase price with a check drawn on his account at the Denver National Bank, and that he paid for both pieces of property and took and recorded the deeds in his own name. As soon as he was threatened with litigation, he conveyed the property to his wife and disposed of all his property. At any rate, from every standpoint in the case there was sufficient evidence to cast upon her the burden of showing the honesty and good faith of the transfers, and that the transaction between them was free from fraud. They well understood, and assumed the burden of this responsibility by attempting to show when, how and where she obtained the money. She was the only witness who testified on this point, and her evidence conflicts with that of no other witness in this regard. Her bald and general statements to the effect that her money purchased the premises are not controlling or binding and conclusive on the court. Before she has sustained this burden, the whole of her testimony fairly considered must show that her money purchased the properties. She studiously avoided reference to any record by which the accuracy of her general statements might be verified. Fair and honest business transactions usually are easily traced, and the law will not uphold a conveyance to his wife when it is attacked by creditors of an insolvent husband, which is shrouded in doubt, mystery and uncertainty. True, her evidence was conflicting, but the conflict was internal—within itself and not with that of any other witness, for no other witness testified on the subject, and the rule in regard to

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conflicting evidence does not apply in such a case.—*Bachman v. People,* 8 Colo. 472, 9 Pac. 42; *Lawrence v. Weir,* 3 Colo. App. 401, 33 Pac. 646.

We have considered the whole record with unusual care. The wife's testimony is voluminous, and we can only briefly outline it: From May, 1898 to September, 1908, inclusive, she and her husband lived on the tract of land in Idaho which he sold for $4,500. During the spring of each year she boarded sheep shearers, and put the money so earned, away in the bottom of an ordinary trunk in the house, instead of depositing it in a bank, and when they started for Denver, the accumulations amounted to $8,000.00; from this money she paid for the Colorado properties. She understood when she married Trafton, that he had served a term in the Idaho penitentiary, was a gambler, a drunkard, ran after other women, and never worked or earned a dollar. She fed and clothed him, paid all the bills, and out of the proceeds of her business kept him in spending money. In 1900 he was again sentenced to the Idaho penitentiary for two years upon a charge of grand larceny, and she spent from her earnings over $700.00 in his defense. At one place she says her husband did not know this money was cached in the trunk, and at another that he knew all about, and had free access to it. She hoarded money for eleven years in a trunk because she was afraid of banks, and yet, during the two years he was in the penitentiary she conducted all the business and says she kept her account at a bank. After coming to Denver, she furnishd her husband the money with which he opened the account at the Englewood bank in her name; but because she was afraid of banks, she kept $7,500.00 secreted in a trunk. Her husband, when they left Idaho purchased a bank draft for $4,275.00, but she put her $7,500.00 in a hand satchel and carried it to Denver.

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Her method of expending the money is even more astonishing than her accumulation of it. When they started for Colorado she gave her husband $500.00 of her $8,000.00, for expense money, notwithstanding he had retained $225.00 out of the proceeds of the land sale. On reaching Denver, they stopped for sometime at a hotel, and she paid all the expenses, still transacting the business, whatever it was. From September 14, to November 20, 1908, she gave her husband out of the $7,500.00 hoarded in the trunk, $5,500.00 which he spent on drink, gambling and women, which she knew he would do when she gave it to him. November 19, 1908, she went into the chiropodist and clairvoyancy business out of which, besides maintaining herself and husband, and paying all expenses, she made enough to pay $1,050.00 for an automobile, gave her husband $2,070.00 to deposit, and paid $800.00 on a rooming house. These accomplishments for obtaining easy money were suddenly dispelled by each being sentenced to the Colorado penitentiary for a term of two years for working a confidence game.

Her evidence is so transparent, inconsistent, improbable, contradictory and unbelievable, that the trial court was not warranted in finding she had sustained the burden of proof of showing the good faith and honesty of the transaction. The judgment is reversed and the cause remanded with directions to the lower court to enter a decree in favor of the defendant in accordance with the prayer of the cross complaint.

Reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

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[No. 7827.]

LATHROP v. MADDUX.

1. PLEADINGS—*Construed.* The complaint alleged a purchase by plaintiff from defendant of a traction engine; that the purchase was induced by certain representations of defendant as to the capacity of the engine, which were relied upon by plaintiff; the falsity of these representations, the entire insufficiency of the machine, its return by plaintiff and receipt and detention by defendant, and prayed judgment for the return of the moneys paid by plaintiff on account of the purchase, and the cancellation of certain promissory notes executed by him for part of the purchase price. *Held* an equitable action for rescission of the contract. (259, 262)

2. FRAUD—*Sale—Innocent False Representations of the Seller,* material to the transaction, and inducing the purchase, bind him in equity even though he was not guilty of intentional fraud. (265)

3. ——*False Representations as of One's Own Knowledge,* as to matters of which the party is ignorant, the law imputes a fraudulent intent. (265)

4. ——*Rescission of Contract—Delays.* One who would rescind a contract must do so within a reasonable time. Delays induced by the promises of the other party, or his acts and declarations, may be excused. (267)

Error to Montrose District Court.—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. C. J. MOYNIHAN, Mr. DAN H. HUGHES, and Messrs. DAVIS, WHITNEY & MOTHERSILL, for plaintiff in error.

Mr. WALTER P. CROSE, and Messrs. CATLIN & BLAKE, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action to rescind a contract. The complaint in brief, alleges, that on the 28th day of August,

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1909, the plaintiff entered into an agreement with the defendant for the purchase of a twenty horse power International Harvester gasoline traction engine. That the agreed price was $1,680.00, to be delivered in the city of Montrose, of which $500.00 was to be paid upon delivery, and the remainder by two promissory notes due January 1, 1910, and December 1, 1910, respectively, to be secured by chattel mortgage.

It is alleged that the defendant represented to the plaintiff that the engine so agreed to be purchased, was a twenty horse power traction engine; that said engine would develop twenty horse power at the belt and twelve effective horse power on the traction. That the engine was identically the same engine that had been entered in competitive tests for plowing purposes in Manitoba and Brandon, Canada, and at which time it had won prizes and made records; that the engine was in every way suitable for the purposes desired, with standard size and weight shaftings, and castings made of the best material, and that the machine would develop 240 revolutions per minute, twelve horse power effective traction, and would give a speed on the traction of two and a quarter to two and one-third miles per hour; that the defendant further represented that the engine would have 22 inch drive wheels; that the plaintiff believed and relied on such representations by the defendant, and by reason thereof contracted for the same upon the terms above set forth.

It was further alleged that afterward a traction gasoline engine was delivered by the defendant to the plaintiff; that at the time of the delivery, the plaintiff was ill, and in a sanitarium, and unable to inspect the machine, but thereupon paid the $500.00 in cash, and executed and delivered the notes and mortgage; that shortly

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thereafter repeated attempts were made to do plowing with the engine, and with care and under varying conditions, and that under such tests the engine failed to develop more than five horse power of effective traction at any time, and did not exceed a speed of more than one and a quarter miles per hour. That the engine delivered is not the kind of an engine which participated in the competitive tests as represented by the defendant; that all such engines were gear driven and that the engine delivered was a friction drive. The complaint alleges many other defects in the construction of the engine, and that after such tests, and immediately after the discovery of the defects, the plaintiff notified the defendant thereof. That thereafter the defendant caused two of his experts to overhaul the engine, and put it in order, but that they were unable to develop more than three horse power effective traction, or a speed of more than one and one-half miles per hour. That at that time the plaintiff advised the defendant that the engine was not as represented and thereupon re-delivered the same to the defendant, and which delivery was accepted by him, and who thereafter kept it in his possession.

The complaint further alleges a demand for the cancellation of the two notes, and for the sum of money paid in cash upon delivery of the engine. The complaint further alleges damages sustained, and also contains another cause of action upon a different matter.

The answer is a specific and general denial of the allegations of the complaint and asks for judgment upon the notes remaining unpaid, and for foreclosure of the mortgage.

There is no contention in the briefs and arguments that the engine was as it is alleged to have been represented, nor that it was such as to in any reasonable manner do the work for which it was purchased.

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The contentions of the plaintiff in error are; that the plaintiff is precluded from recovery in the case for the reasons: (1) that the cause of action, if any, set up in plaintiffs pleadings, is one for loss for damages upon breach of warranty and not one for rescission; (2) that if it be an action for rescission, then there is not sufficient evidence of fraud to sustain such action; (3) that in any event the plaintiff has waived his right to rescission by not acting promptly, by dealing with the property as his own, and by placing himself in such position as to make it impossible to place the defendant below, *in statu quo*.

The complaint alleges a contract of sale, certain representations and warranty as to the character of the engine, and as to speed, power and work it was represented to do, as related to the purpose for which it was purchased, together with a statement of results of field tests, in which the kind of an engine so sold participated, together with reliance by plaintiff upon such representations, and contains allegations as to the falsity thereof.

It closes with a prayer specifically asking for a return of the sum paid upon delivery, with interest, and for the cancellation of the two unpaid notes. The case was tried upon this theory and judgment rendered accordingly. The findings of the court conclude in the following language: "I am not satisfied as to the damage that has been done to this engine by the use. The evidence is not clear upon that subject, nor am I satisfied as to the amount of damages which the plaintiff suffered. Certainly, some of his claims, for damages are unreasonable, and are not established at all, in my judgment. I will ignore his claim for damages and I will give a judgment for the plaintiff in this case for the return of the money, which he paid, and for the cancellation of the notes and mortgage, and that he recover his

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costs." It is very clear that the action was one in equity and to rescind the contract.

It appears that in the month of May, 1909, the plaintiff Maddux called upon the defendant Lathrop, at the latters' hardware store in Montrose, and expressed a desire to purchase a gasoline traction engine. The defendant then stated that he had no such engine as that desired, but that he handled other kinds of machinery of the International Harvester Company, and would look into the matter. Shortly afterward a Mr. Stream, representative of the Harvester Comany, came to Montrose and the defendant then took him to see Mr. Maddux. After some general conversation between this agent and Maddux relative to the Harvester Company's traction engine, Maddux signed an order for an engine. This order was dated May 26, 1909, and was given by the plaintiff with the understanding that it was not to be final until the plaintiff had thirty days time in which to make an investigation concerning the merits of the engine, thus agreed to be purchased, within which time the plaintiff might countermand his order.

The testimony further shows that within the thirty days from the signing of the order Maddux, the plaintiff, went to the defendant's store and told him that he had made an investigation concerning the engine manufactured by the Harvester Company, and that such investigation was unsatisfactory, and therefore would not take it. That later, and in August of that year, the defendant sent for Maddux, who came to the store, whereupon the defendant produced a sales catalogue, or rather a catalogue of the Harvester Company designed for the trade, and upon this matter the plaintiff testified that, "he, Lathrop, brought out reports of the Winnipeg trial and said, 'I told you the engine was the best engine made and this proves it to you.' He showed reports and

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printed matter concerning the International Harvester engine. It was an advertisement in the dealers journal that he showed me, to show how cheaply it would work and what prizes it had taken. He told me that was what it had done and I could see what it could do. He proposed to send me the engine itself, the identical engine that had participated in these trials. He had a letter from Mr. Stream, which he read to me, stating, that Mr. Stream kept posted on these things and knew how it was, and that Mr. Stream said that it was all right. He told me the International Company did a big business and they could not afford to give out information that was not satisfactory, and that he would guarantee anything they say about it."

The trade journal which was then exhibited to the plaintiff, was introduced in evidence, and in this appears to be a cut or picture of the engine, together with accounts of the field tests in which that kind of engine was the winner.

It is admitted by the defendant that the engine or the kind of engine that participated in the field trials, the account of which was exhibited to Maddux at the time that he gave the order, was not the same engine delivered to Maddux. It appears that the engine delivered was of an earlier manufacture and was a friction drive, while the engine that participated in the field tests and which the plaintiff thought he was buying, was a gear drive.

The defendant Lathrop contends that he made no warranty at the time the order was given, and that he did not know there was any difference between the engine that participated in the trials, and the engine he delivered to the plaintiff, and it would appear that neither Maddux nor the defendant had any clear understanding as to whether the engine used in the field trials

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was a friction or a gear drive. This much however appears from the testimony to be clear, that the plaintiff purchased the engine with the full understanding upon the part of the defendant, that his purchase was to be the kind and character of engine that had been the winner in the field tests described in the journal. When in fact the engine delivered was an entirely different sort of an engine. It is likewise plain that this purchase was made solely upon these representations, and also, that the engine was unfit for the purpose for which it was sold to the plaintiff.

It is contended by counsel for defendant, that there is no evidence of such fraud or mistake as will justify a rescission of the contract. That it is a case of mutual mistake, and this argument is based upon the testimony of defendant Lathrop, as follows: "I didn't know at that time the difference between the engine I was authorized to sell, and the one that is described in the advertisement. The difference is between the cog drive and friction drive. That is what I understand. I was not aware when I showed him that advertisement that that advertisement was any different, illustrated any different kind of an engine than what we already had his order for. I don't think he was aware of any. I have learned since that they are two different engines, but I don't think either of us knew it then."

It cannot be said that the representations so made to the plaintiff by the defendant to induce the purchase were in any sense accidental.

Maddux had refused to purchase the Harvester Company engine because of his investigation, and information obtained unfavorable, after signing the original order. He had so advised the defendant.

The evidence further shows that with the knowledge of defendant, Maddux had ordered another and different

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engine from a Pennsylvania manufacturer, after his refusal to take the one ordered in May of the Harvester Company, but which he was unable to secure. That it was after this that the defendant induced him to order the one which had succeeded in the field tests.

Nothing can be clearer than that the order was given upon the representations at that time, by means of the showing in the trade journal, and the defendants statements concerning the truth of such showing.

It is equally true that he did not receive the machine discussed in the trade journal, but on the contrary, an entirely different one.

Giving to both parties full credit for sincerity, then the defendant intended to sell and the plaintiff intended to buy the machine described in such journal, and not the one that was delivered to him.

It can hardly be said that the defendant was innocent in the matter of making the representations he did, for he was the seller and it was his duty to know as to the truth or falsity of his representations which induced the purchase and upon which representations the buyer relied. But if we concede that the defendant was innocent of intentional fraud, he is nevertheless bound in equity by his representations.—*Brooks v. Hamilton,* 15 Minn. 26, Gil. 10; *Baptiste v. Peters,* 57 Ala. 158.

It was said in *Stimson v. Helps,* 9 Colo. 33, 10 Pac. 290, that:

"It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent.—Kerr, Fraud & M., 54 et seq., and cases

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cited; Bigelow, Fraud, 63, 84, 453; 3 Wait, Act. & Def. 438 et seq.; 2 Estee, Pr. 394 et seq." *American B. & T. Co. v. Burke,* 36 Colo. 49, 85 Pac. 692.

As was said in *Smith v. Columbus Buggy Co.,* 40 Utah, 580, 123 Pac. 580:

"This, however, was not an action for deceit. It was one to rescind a contract and to leave the parties thereto in *status quo.* In the latter action, it is not essential, like in the former, that the party who made the representations knew them to be false. It is enough if it be shown that the representations were in fact false; that the party who rescinds had a right to rely and did rely on them, and was thereby deceived, and for that reason entered into the contract of purchase; and that the representations were material—that is they related to the subject matter of the contract of purchase. All the well-considered cases are to this effect. See, among others.—*Kountze v. Kennedy,* 147 N. Y. 129, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Foster v. Wilshusen,* 14 Misc. Rep. 520, 35 N. Y. Supp. 1083; *McClellan v. Scott,* 24 Wis. 81, and cases cited in them."

The defendant further contends that the plaintiff waived his right of rescission by not acting promptly and in dealing with the property as his own. The evidence does not justify any such conclusion. This shows that the engine was delivered at Montrose in October, 1909, and that the plaintiff was then confined by illness at a sanatarium where the notes and mortgage were executed. It was a very dry fall, and little could be done to test it until the following spring. In the fall when the plaintiff complained of the defects, the defendant asked him to wait until spring and said he would see that it was all right. Plaintiff learned in February, 1910, that it was not the engine he had purchased. Lathrop insisted he would make it good, and had experts attempt

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to do so. The plaintiff finally delivered the machine to Lathrop May 10, 1910. Lathrop attempted afterward to sell it to another party but failed to do so.

It is the rule of the law that when a party elects to rescind a contract he must do so within a reasonable time, and what constitutes a reasonable time depends upon the facts and circumstances of the particular case, to be determined by the court. Neither may such party play fast and loose. But the evidence does not disclose such a situation in this case, particularly so when we consider the repeated promises of Lathrop to remedy the defects.

The rule in this respect is stated in 35 Cyc. 154, to be; that a delay on the part of the buyer will be excused in exercising his right to rescind, if it is due to the promises of the seller that the defect will be remedied, or to his requests that further trial be made, or to other acts or declarations of the seller tending to induce delay.

The testimony shows no equities in favor of the defendant. He delivered a machine other and different from the one represented and one that did not meet the representations made concerning it, and which proved upon tests, substantially worthless for the purpose for which it was sold.

Under the state of facts presented the defenses interposed are merely technical, and do not go to the merits. Such defenses may be entitled to consideration when they tend to promote justice, but when the sole result can be to perpetuate a wrong, they are not entitled to serious consideration, so long as a settled rule of law is not violated.

The judgment is affirmed.

MUSSER, C. J. and GARRIGUES, J. concur.

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[No. 7856.]

GRIMM V. YATES.

1. MECHANICS LIENS—*A Creature of Statute*, and can be enforced only in cases within the statute and by those persons to whom the statute plainly gives the right. (273)

2. ——*Notice of Non-Liability from Land Owners—When Required.* The purpose of Rev. Stat. Sec. 4029 is to require the land owner, where another in possession is making improvements not authorized by any agreement between them, to give notice to those performing the labor, or furnishing the material, that his interest is not to be subjected to any lien therefor. Where the work is such as is authorized by agreement between the land owner and the person at whose instance such work is performed, and is not such as entitles those performing it to a lien under the other provisions of the statute, the estate of the land owner does not become chargeable by his failure to give the notice. (279)

3. ——*Work Upon Mines—At Instance of Lessee.* Section 4028 of the Revised Statutes does not entitle those performing ordinary development work, at the instance of a lessee, merely in order to extract the ore which the mine contains, to a lien upon the estate of the lessor. (274)

A bond conditioned for the conveyance of a mine recited that the obligee should be entitled to immediate possession, should commence work on the premises by a day named, "and work the same continuously, in a thorough and workmanlike manner," depositing in a specified bank, to the credit of the obligee, a certain percentage of the values extracted, "all shaft work * * * to be substantially timbered * * * and all drifts where reasonably necessary." The work done by the obligee was that usually performed for extracting ores. *Held* that, as against the mine owner those performing the work were not entitled to a lien under this section of the statute. *Pike v. Empfield* 21 Col. App. 161, and *Clark Co. v. Centennial Co.* 22 Col. App. 174, distinguished. (269, 275, 280)

Error to Boulder District Court.—Hon. H. P. BURKE, Judge.

Mr. HARRY E. KELLY, Mr. CHARLES H. HAINES, for plaintiff in error.

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Mr. F. G. FOLSOM, for defendant in error.

The question presented is the right of defendant in error to a lien under the mechanic's lien act, sections 4025, et seq., R. S. 1908, awarded him by the trial court upon the Herald Mining Claims, the property of plaintiff in error. For convenience we shall refer to the latter as defendant, and the former as plaintiff, that being their relation in the court below.

About July 1, 1908, defendant entered into a written agreement with John M. Yates, whereby he agreed to sell the latter the property involved for a sum specified, and to execute and deposit with the First National Bank of Boulder, in escrow, a deed conveying the property to Yates, which was to be delivered on the payment of the purchase price. In this contract, plaintiff was designated the party of the first part, and Yates as party of the second part, and provided that; "Whereas the said party of the first part has further agreed to place the said party of the second part or his assigns, in full and peaceable possession of said property, to mine, remove and sell ore therefrom; the said party of the second part or his assigns to commence work on said premises before the fifteenth day of July, A. D. 1908, and thereafter to work the same continuously in a thorough and workmanlike manner, employing at least two (2) men underground, working at least twenty-five (25) shifts to the man each calendar month, and to permit the party of the first part to have access to all parts of said property at all times, and to allow no person not in privity with the parties hereto to take or hold possession of said property, or any part thereof, under any pretense whatever, and during the continuance of this bond and lease to deposit in said First National Bank to the credit of said party of the first part twenty (20) per cent. of the

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net smelter or mill returns of all ore taken from said property, as and when received, said sum so deposited to be a part payment of said purchase money, and to deposit in connection therewith a duplicate copy of mill and smelter settlement sheets for all ore shipped from said property, within ten (10) days from the date of such shipment. All shaft work done in connection with this contract to be substantially timbered in a workmanlike manner, and all drifts shall be timbered when reasonably necessary. * * *

"Now, therefore, the condition of the above obligation is such that if said party of the second part, or his assigns, shall fail to comply with the terms of the aforesaid agreement or any of them, time being of the essence hereof, and if the said party of the first part shall well and faithfully perform the same, then this obligation shall be null and void, otherwise remain in full force and effect, and in case of such failure all sums deposited as aforesaid shall be retained by the said party of the first part as liquidated damages and the party of the second part shall forthwith surrender possession of said premises."

Under this agreement Yates worked the properties from July 1, 1908, to the 19th day of April, 1910, when he assigned it to the Herald Mines Company, a corporation, which at once entered into possession of the mines, and worked them until February 11, 1911. Plaintiff and others who assigned their accounts to him, worked in and upon the mines for this company. These accounts not having been paid, plaintiff filed his lien statement, claiming a lien upon the mining property.

In his complaint to foreclose plaintiff alleged that between dates named, which vary from the 12th day of December, 1910, to the 11th day of February, following, his respective assignees, including himself, rendered

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services for the Herald Mines Company in working, operating and developing the property under bond and lease, and stated the sum due each for this work. He further alleged that during these periods the Herald Mines Company operated the property with the full knowledge and consent of the defendant, and that he did not give the notice required by section 4029, R. S. 1908. The answer put in issue the allegation of the knowledge of defendant that the property was being operated by the Herald Mines Company, or that it was developing or improving the property, and set out *haec verba* the instrument to which we have referred.

The replication of plaintiff alleged that the property was improved by the Herald Mines Company by means of shafts, tunnels, inclines, adits, drifts, and other improvements thereon, and that plaintiff and his assignors performed labor upon these improvements.

At the trial it was admitted that the notice mentioned in section 4029 was not given by the defendant. The testimony, in addition to the execution of the bond and lease, established that the work for which the lien was claimed was performed by the plaintiff and his assignors, at the instance of the Herald Mines Company, in the different capacities of engineer, trammer, operating machine drills, timbering, working on the hoist, blacksmithing, sorting ore, superintending, stoping or breaking down ore above the two levels, drifting on the vein for an ore-chute, making an up-raise for ventilation, a cross-cut in the foot wall, and a station. The ore broken was sorted and sold. In short, all the work performed by the plaintiff and his assignors was of the character usually done in the ordinary course of mining for commercial purposes.

It appears that all drifting was in and along the vein at the 150 foot level. What is termed an up-raise was nothing more than a stope, except possibly in one

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place, a connection was made between the roof of the stope and the level above, by an excavation for ventilation which extended a few feet from the top of the stope. The timbering was in the stope.

The character of the work during the period for which the lien is claimed is described by the witness, Yates, as follows: (quoting from the abstract) "I am familiar with all the work that was done on this property from December 1st, to February 11th, it was what I consider ordinary mining work, drifting and stoping. Practically all that was done was just such work as was necessary to reach and remove the ore that was taken out by the Herald Mines Company."

Mr. JUSTICE GABBERT delivered the opinion of the court:

Section 1, of our lien act, session laws 1899, 261, being section 4025 R. S. 1908, provides, so far as material to consider, that: "Mechanics, material men, contractors, sub-contractors, builders, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, * * * tunnel, * * * or any other structure or improvement, upon land, * * * shall have a lien upon the property upon which they have rendered service or bestowed labor * * * for the value of such services rendered or labor done * * * whether at the instance of the owner or of any other person acting by his authority or under him, as agent, contractor or otherwise; for the work or labor done or services rendered * * * by each respectively, whether done or furnished or rendered at the instance of the owner of the building or other improvement, or his agent; and every contractor, architect, engineer, sub-contractor, builder, agent or other person

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having charge of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this act." Section 4 of the act, being section 4028, *ibid,* provides: "The provisions of this act shall apply to all persons who shall do work. * * * as provided in section 1 of this act, for the working, preservation, prospecting or development of any mine, lode or mining claim or deposit yielding metals or minerals of any kind or for the working, preservation or development of any such mine lode or deposit, in search of any such metals or minerals; and to all persons who shall do work * * * upon, in or for any shaft, tunnel, mill or tunnel site, incline adit, drift or any draining or other improvement of or upon any such mine, lode, deposit or tunnel site; * * * and provided, further, That this section shall not be deemed to apply to the owner or owners of any mine, lode, deposit, shaft, tunnel, incline, adit, drift or other excavation, who shall lease the same in small blocks of ground in areas, whether of surface or beneath the surface, not to exceed 150 feet in length by the width of the claim and for a depth of 150 feet or less to one or more sets of lessees."

Liens of the character under consideration are purely creatures of statute. They neither exist nor can be enforced, except in cases falling within its purview and only those persons whom the statute plainly gives the right to a lien can acquire it. Such has been the uniform ruling of this court and the Court of Appeals.

Section 8 of the lien act as it existed prior to the act of 1899, and as amended, session laws, 1895, 202, was substantially the same as section 4028, supra. Under that section it was held in *Wilkins v. Abell,* 26 Colo. 462, that the purpose of section 8, when read in connection

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with other provisions of the lien act, or which it formed a part, was to give a lien on mining property upon the same conditions that a lien attaches to other property, for services rendered the owner, or some one of the enumerated persons acting for him, as his agent, but that the lessee of a mining claim was not one of such persons, for the reason that the lessee is not employed by the lessor to do any work for him, as by the demise to the lessee he acquires a qualified interest in the property leased, which entitles him to work the same for his own benefit. This ruling was followed in *Antlers Park R. M. Co. v. Cunningham,* 29 Colo. 284, 68 Pac. 226, and *Williams v. Eldora Enterprise G. M. Co.,* 35 Colo. 127, 83 Pac. 780. In the latter case *Maher v. Shull,* 11 Colo. App. 322, 52 Pac. 1115; *Schweizer v. Mansfield,* 14 Colo. App. 236, 59 Pac. 843, and *Little Valeria M. & M. Co. v. Ingersoll,* 14 Colo. App. 240, 59 Pac. 970, where substantially the same ruling was announced, were cited with approval. In the Wilkins case, it was also contended that by virtue of the proviso included in section 8, passed in 1895, the owner of the fee was liable for work performed at the instance of the lessee unless the lessor leased the mine "in small blocks of ground to one or more sets of lessees." Passing upon this question it was held that: "The office of a proviso is not to enlarge or extend, but rather to put a limitation or restraint upon the language which the lawmaker has used in the body of the act. It excepts something from, but adds nothing to the act;" and therefore the proviso of itself could not be construed to give any lien that did not exist by virtue of the affirmative provisions of the act.

Following the cases above cited, we think it is clear that under section 4028, a lien in favor of the plaintiff cannot be established, because the work he and his as-

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signors performed was done at the instance, and for the benefit, of the Herald Mines Company, whose relation to the defendant was that of lessee only, and that the proviso in that section cannot be construed to give a right to a lien in such circumstances. Neither does the fact that the instrument, executed by the defendant, was a bond and lease change the situation. The Mines Company was not in possession by virtue of the option to purchase, but under a contract of leasing and solely for the purpose of working the property under the lease, at a stipulated rent in the nature of royalty. The portion of the instrument which may be denominated a bond or option to purchase did not require the vendee to make any improvements. The only condition imposed upon the lessee by the lease was that work should be commenced within a time specified, and thereafter work the property continuously, in a thorough and workmanlike manner, employing not less than two men underground, working at least 25 shifts to the man each calendar month, and that all shaft work done should be substantially timbered in a workmanlike manner, and all drifts timbered when reasonably necessary. According to the testimony, the work performed by the plaintiff and his assignors was of the character usually done in the ordinary course of mining. A lessee of a mine must at least do ordinary development work in order to extract the ore it contains and to extract it necessarily requires work to be done upon the mine. This character of work, when performed at the instance of the lessee does not under the sections of the lien act so far considered, give the parties performing such work any right to a lien upon the fee of the lessor. Such is the ruling in the Williams case, where that question is fully discussed.

This brings us to a consideration of the question of whether the failure of the defendant to give the notice

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mentioned in section 4029, R. S. 1908, subjects his interest in the property to a lien in favor of the plaintiff. That section provides: "Any * * * tunnel, * * * and every structure or other improvement mentioned in the preceding sections of this act, constructed, altered, added to, * * * or repaired, either in whole or in part, upon or in any land, within the knowledge of the owner or reputed owner of such land, * * * shall be held to have been erected, constructed, altered, * * * repaired, or done at the instance and request of such owner or person, but so far only as to subject his interest to a lien therefor as in this section provided; * * * unless such owner or person, shall, within five days after he shall have obtained notice of the erection, construction, alteration, removal, addition, repair or other improvement, aforesaid, give notice that his interests shall not be subject to any lien for the same, by serving a written or printed notice to that effect, personally upon all persons performing labor or furnishing skill, materials, machinery or other fixtures therefor, or shall, within five days after he shall have obtained the notice aforesaid, or notice of the intended erection, construction, alteration, removal, addition, repair or other improvement aforesaid give such notice as aforesaid by posting and keeping posted a written or printed notice to the effect aforesaid, in some conspicuous place upon said land or upon the building or other improvement situate thereon. Provided, That this section shall not apply to co-owners of unincorporated canals, ditches, flumes, aqueducts, and reservoirs not (nor) to the enforcement of chapter 116 of the session laws of Colorado of 1893; And, provided, further, that the provisions of this section shall not be construed to apply to any owner or person claiming any interest in such prop-

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erty who shall have contracted for any erection, structure or improvement mentioned in this act."

The important question is in what circumstances must the owner of property give the notice required by this section in order to protect his fee from being subjected to a lien for the character of improvements therein mentioned. Clearly, if the owner has entered into a contract to have such improvements constructed, which under the provisions of the lien act would subject his fee to a lien therefor, he cannot prevent the lien attaching by giving notice that his interest in the property shall not be subject to a lien for such improvements. That would defeat the very purpose of the lien act, which by preceding provisions, care has been taken to prevent. Evidently the purpose of the section is to require an owner, where another in possession of his property is making improvements, which by the terms of the agreement between the owner and the party in possession, the latter is without authority to make, to give notice to those performing labor, or furnishing materials for such improvements, within five days after he shall have obtained knowledge that they are being constructed, that his interest in the property, upon which such improvements are being placed, shall not be subject to any lien therefor, and that his failure to do so renders his interest subject to a lien for such improvements. That this is the manifest purpose of the section is plain from its provisos, which are to the effect, that it shall not apply to an owner who has contracted for such improvements, nor the owners of unincorporated canals, ditches, flumes and reservoirs, nor to the enforcement of chapter 116, session laws of 1893. Turning to that chapter we find it provides, that co-owners of unincorporated ditches, except as therein limited, shall pay for the necessary cleaning and repair of such ditches, in the proportion

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that their respective interests bear to the total expenses incurred in doing that character of work, and that the owners performing such work shall have a lien upon the interest of a delinquent co-owner, for his proportion of such cost and expenses. These provisos make it clear that by the section it was not intended to allow an owner, by posting notices, to relieve his property from a lien attaching for improvements, when by virtue of his contract with the person making them, his property under the lien act, is subject to a lien therefor, and that its object was to estop the owner from asserting that unauthorized improvements were not made at his instance and request, if constructed with his knowledge, unless he gives the notice required by the section. In brief, the purpose of the section was to give a lien for improvements not authorized by any contract between the owner and the person at whose instance they are being constructed, when by his seeming acquiescence through silence, it would be inequitable to relieve his property from a lien for such improvements. Such, in effect, is the construction given the section under consideration by our Court of Appeals in *Fisher v. McPhee-McGinty Company,* 24 Colo. App. 420, 135 Pac. 132. In that case, one French, agent for the lessee, was in possession of property under a lease from Mrs. Fisher, and made improvements on the property which were not authorized by the lease. The lessor, however, through her agent had knowledge that such improvements were being made, and failed to give the notice required by section 4029. The parties making these improvements or furnishing materials therefor, sought to enforce liens against the premises upon two grounds, (1) because the owner, expressly or impliedly, through a tenant, contracted for the materials furnished and the labor performed and (2) that the improvements upon the premises for which liens were

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claimed could be enforced upon the fee of the owner because they were made with her knowledge and she failed to notify the lien claimants that her interest would not be subject to the liens. Speaking to the first point, the court, through King, J. said. "Unless so provided by the terms of the lease, the lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor for the lessor, within the contemplation of the lien statute. The owner of property cannot be bound, nor his property charged with a lien by the unauthorized act of the lessee in having improvements made on the leased property," and concluded by stating in substance that as the improvements were unauthorized, liens would not attach under the general provisions of the mechanic's lien act. Speaking to the second point, which involved a construction of section 4029, it was said: "This section charges land with a lien for the cost of any building constructed thereon or altered, added to or improved, with the knowledge of the owner, if he shall not have contracted therefor, but from which lien so charged he may be relieved by compliance with the statutory requirements as to notice."

None of the work performed by plaintiff and his assignors was unauthorized by the instrument executed by the defendant under which the Mines Company was working the mines. Hence the defendant was not required to give the notice mentioned in section 4029, and his failure to do so did not subject his interests to the lien claimed. All work was performed at the instance of the Herald Mines Company, whose interest in the properties involved, and relation to the defendant, Grimm, was that of lessee only, and was of that character in fact, and by the terms of the lease, for which a lien will not attach to the fee of the owner. Conse-

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quently, it follows that plaintiff is not entitled to any lien upon the interest of Grimm in the mines.

Counsel for plaintiff rely upon *Pike v. Empfield,* 21 Colo. App. 161, 120 Pac. 1054, and *Clark Hardware Co. v. The Centennial T. M. Co.,* 22 Colo. App. 174, 123 Pac. 322. The former case is based upon the ground that as between the owner and the party at whose instance the work was performed, for which the lien was claimed, the relation of vendor and vendee existed, as the latter bound himself to purchase the property, and hence, the case was ruled by *Shapleigh v. Hull,* 21 Colo. 419. In the Clark Hardware case the decision was based upon the allegations of the complaint, to the effect that the materials furnished the lessee were used for the working, preservation, prospecting and development of the property involved, thereby enhancing its value, with the knowledge of the owner, who failed to post the notice mentioned in section 4029. To this complaint a general demurrer had been interposed, and it was held that as against such demurrer the complaint stated a cause of action for a lien under the provisions of section 4029. The case is so construed by the same court in *Milwaukee Gold Mining Company v. Tompkins-Cristy Hardware Company,* 141 Pac. 527.

Other questions are argued in the briefs of counsel for defendant, which it is not necessary to consider. Cross-errors are also assigned on behalf of plaintiff, but as none of the questions thus presented are material to the grounds upon which our decision is based, they need not be passed upon.

The judgment of the District Court, in so far as it awards a lien upon the fee of the defendant, is reversed, and the cause remanded with directions to dismiss the action as to him.

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Judgment reversed and cause remanded with directions.

Decision *en banc*.

Mr. JUSTICE HILL dissents.

[No. 8045.]

KENDRICK, COUNTY TREASURER, v. TWIN LAKES RESERVOIR COMPANY.

1. TAXATION—*Taxable Property—Works of Irrigating Company.* A canal owned by mutual irrigating company, and used exclusively for irrigating the lands of the individual members of such corporation is exempt, under the constitution, from separate taxation.

The head-gates of such canal are parts thereof, and are likewise exempt. (287)

So a dam, which is part of the works by which water is collected and diverted. (287)

Such works are not to be regarded as improvements to the land upon which they are situate. (287)

2. ——*Water Rights*, under Rev. Stat. Sec. 5540 are, for the purposes of taxation, part of the real estate upon which the water is applied. (288)

3. CONSTITUTIONAL LAW—*Legislative Power.* As a general proposition, and save as restricted by the constitution, it is competent for the legislature to fix the *situs* of property for taxation. (288)

Error to Lake District Court.—Hon. JAMES OWEN, Judge.

Mr. JOSEPH W. CLARKE, for plaintiff in error.

Mr. W. L. HARTMAN, Mr. C. A. BALLREICH, and Mr. CHAS. W. O'DONNELL, for defendant in error.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. This action involves the legality of a tax assessed and levied upon a reservoir system storing water for irrigation in Lake county, to be used upon lands in Crowley county. After the complaint, answer and replication were filed, the cause was submitted to the court by agreement, and the facts settled, in the main, by an agreed statement in open court, the right to maintain the action not being questioned.

The Twin Lakes Reservoir Company, defendant in error, is a mutual corporation organized under the laws of Colorado for the purpose of acquiring the site known as Twin Lakes in Lake county, for a reservoir, storing water therein for irrigation, and conducting it to where it is to be applied for the exclusive use of its stockholders in Otero, now Crowley county. Lake creek is the old outlet or natural water course connecting Lower Twin Lake with the Arkansas river. In utilizing the reservoir, a solid dam was built across this channel from bank to bank, and a new canal about a mile long, called the outlet canal, constructed from the margin of lower Twin Lake to Lake Creek. The stored water is conducted through this canal from the Lower Lake into Lake creek, thence into the Arkansas river and down this stream through the counties of Lake, Chaffee, Fremont and Pueblo to the river headgate of the Colorado canal in Pueblo county, thence through the canal into Crowley county, where it is distributed *pro rata* to its stockholders who use it exclusively for irrigating their lands in that county. The corporation is purely a mutual reservoir company, in which the capital stock stands for and represents the consumer's interest in the reservoir, canal and water rights. The benefit derived from owning the stock, is the exclusive use of the water it represents. It is not

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a dividend corporation, a dividend has never been declared, and under its charter, never can be declared on its capital stock. All expenses and obligations of the company, including the cost of operation and maintenance of its works, are paid by annual assessments on the capital stock, *pro rata*, voted by the stockholders, and it has no other means or raising revenue.

In 1907, the assessor of Lake county added to the tax schedule turned in by the company, the following item: "A structure known as a dam and gate across the present outlet of lower lake," and fixed and assessed the value thereof at $50,000.00; also "A dam across the lower outlet of lower lake," and fixed and assessed the value thereof, at $5,000.00. These two items were added by the assessor to the tax schedule for the years 1908, 1909, 1910, 1911 and 1912. The $5,000.00 item added by the assessor, is the dam across Lake creek, which is the old outlet or natural channel from Lower Twin Lake. The company constructed and maintained in the outlet canal, called the "present outlet," steel headgates, 400 feet from the margin of the lake, resting on a concrete foundation, with stone and concrete retaining walls between the sides of the gates and the sides of the canal, which gates can be raised and lowered, and are used for the purpose of retaining, regulating, and drawing water from the reservoir. This structure constitutes the $50,000.00 item added by the assessor on "A structure known as a dam and gate across the present outlet." These works are located on a tract of land comprising about 35 acres listed as lot 3 in the NE¼ SE¼, 22-11-80, the assessed valuation of which, for 1907 was $147.00, the tax levied and assessed against it amounting to $4.62. The company paid all the taxes on all its property in Lake county for 1907 and all prior and subsequent years except the two items added to the schedules, and lot 3.

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It tendered the tax on this lot, which tender the treasurer refused to accept unless it also paid the taxes on these disputed items.

The agreed statement of facts contains, *inter alia,* the following:

"That the plaintiff has each year, within the time provided by law, turned in to the county assessor of Lake county, its sworn tax schedule covering all of its property subject to taxation in said county and has paid the taxes thereon each year, except only that it has not included in such tax schedule the dam and the gates in the outlet canal, the taxability of whch is an issue in this case, but that the company in its various tax schedules included the land on which the earth dam is situate and the outlet gates located, that in and for the year 1907, the then county assessor of Lake county added to the tax schedule of plaintiff company that year, an item in the following language: 'a structure known as a dam and gate across the present outlet of Lower Lake' and fixed the value thereof at $50,000; and by adding a further item to plaintiff's tax schedule for that year in the following language: 'A dam across the lower outlet of Lower Lake' and assessed and fixed the alleged value at $5,000; and that the county assessor of Lake county has each and every year thereafter down to the present time added similar items in substantially the same language, and placing the value at the same amount each year, that is $5,000 for the earth embankment and $50,000 for the gates in the outlet canal. And these two items are the items of taxation that are involved in the litigation for the years 1907 to 1912 inclusive; that plaintiff made tender each year of the amount of tax on the sub-division or sub-divisions of land upon which the dam and gates are located, but without including in such tender the tax on the two items of dispute; and that such tender

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was refused because of plaintiffs not including in the tender the tax on the two items so in dispute; so that plaintiff is not in default in the payment of any of its taxes except on those two items in dispute."

These two items were not, and were not intended to be additional assessments upon lot 3, but were items added to the schedule by the assessor after they had been returned, in addition to the valuation of the land.

On the trial of the case, the county took the position that the tax levied on the dam and headgates was intended to be, and was in fact a mode or method pursued by the officials in assessing and levying a tax upon the reservoir system as a whole, and especially upon the impounded water and water rights therein, which were the principal assets of value, and the case is argued here upon that theory. Witness Gildea, who as assessor added the two items, when asked what property they were intended to cover, said:

"It would be my understanding in assessing that as a dam that that would include all that a reservoir means. At least to my mind a dam would not just mean that barrier or that gate that was erected to impound these waters. I would take it to mean that reservoir with all those waters in it. * * * Those two items are the assessment of the reservoir, as I understand it."

T. A. Goldner, one of the assessors who also added the two items to the tax schedules, testified substantially to the same effect, saying that the added assessment and levy on the dam and gates was intended as a mode or manner of assessing the water rights and the right to impound water in the reservoir, which was the valuable asset.

The dam across Lake creek and the headgates mentioned as being in the present outlet canal have no utility or value other than holding and retaining the water

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in the reservoir, and regulating its discharge therefrom. They would be and are worthless and useless except in connection with the outlet canal, and the water rights in the reservoir represent and include whatever utility or value there is in the dam and headgates. The canal would be worthless without the dam and headgates, and the dam and headgates would be worthless without the canal. The water rights in the reservoir which are owned exclusively by the stockholders, have each year since its construction, been assessed as improvements on their respective lands in Crowley county where they have paid taxes on the water rights in the reservoir as improvements.

The stipulation also contains the following:

"By way of example, for the year 1912, the average assessed value of grazing lands in Crowley county * * * was $4.15 an acre; whereas the average valuation for 1912 on lands under said Colorado canal, with Twin Lakes water rights, is $26.84 per acre, and approximately these averages or differences in assessed valuation of grazing lands and lands to which Twin Lakes water rights attach, since the year 1900, maintain. The difference in valuation being almost entirely due to the taking into consideration of the value of the water rights as improvements on the lands. In some instances irrigated lands, with Twin Lakes water rights, have been assessed as high as $25.00 an acre, while lands immediately adjoining, but without water rights, have been assessed at $1.25 an acre; that if the taxes in issue in these cases are valid and must be paid, the stockholders of the plaintiff company, who are paying the taxes on their respective lands and water rights from said reservoir, will have to pay this tax by *pro rata* assessments on the stock of the plaintiff company."

Judgment was entered in favor of the company

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against the county officials, to reverse which the case is here on error.

2. The outlet canal is used exclusively for irrigating lands of the individual members of the corporation owning the canal, and is exempt under constitution from separate taxation. The headgates are a part of the canal, and it would seem absurd to take the position that they could be taxed when the canal is exempt. One might as well say that if a wagon was exempt, it did not prohibit the taxation of the wheels by which it was used. We do not think the $50,000 item as a separate tax upon the headgates of the canal, needs further consideration.

The dam in the old channel has no utility or value disconnected from the reservoir; that is, in and of itself. The essential thing or real value is in the impounded water or water rights in the reservoir, and it is only as the dam, as a part of the system, is used to impound water, that it has any utility or value whatever. It is a means to an end, which is the furnishing of a supply of water for irrigation to the stockholders. Apart from this object, it has no value. The whole of lot 3, containing 35 acres, on which the dam is situated, was listed for taxation at $147.00, the tax thereon being only $4.62. No one would think of assessing the dam separately as an improvement to the land, because considered separately it was not an improvement, but a burden. The dam went with, belonged to and formed a part of the reservoir, and a separate tax could not be imposed upon it as an improvement on lot 3. It is an integral part of the reservoir itself. The taxing officials recognized this, and in explanation of the two items said it was the intention, by the addition of the $55,000.00 valuation to the schedule to tax the essential asset, which was the water rights in the reservoir, and that the assessment and levy upon the dam and gates was adopted as a means to accom-

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plish this end. The question then, to be considered is, where is the place of taxation of the reservoir rights? The revenue act of 1902 provides, that whenever the terms mentioned in section 13 thereof, are employed in the act, that they are used in the sense affixed to them in that section. R. S. 1908 § 5540. This section provides that the term real estate shall include improvements. It then says, that the term improvements shall include buildings, water rights, structures, fixtures and fences erected upon or affixed to land. It therefore follows that water rights, under our revenue law, for the purpose of taxation, are included within and constitute a part of the real estate upon which the water is applied. As a general proposition, unless restricted by the constitution, it is competent for the legislature to fix the situs of property for the purpose of taxation.—*Ames v. People,* 26 Colo. 99, 56 Pac. 656. There is nothing in our constitution which prohibits the legislature from providing that water rights shall be taxed with the land upon which they are applied, and we do not think it was the legislative intent to place a double taxation upon these reservoir rights—one in the county where the reservoir is situated, and another in the county where the rights are used. There is no doubt but these reservoir rights were taxable, and were taxed in Crowley county in connection with the land upon which they were used. Certainly if the stockholders paid taxes on the reservoir rights in that county, where the water was applied upon their lands, they ought not to be required to pay another tax upon the same property in Lake county where none of the water was used. In accordance with the foregoing views, the judgment of the lower court will be affirmed.

Affirmed.

Decision *en banc.*

Mr. JUSTICE WHITE not participating.

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[No. 8049.]

CATLIN, ADMINISTRATOR, v. VANDEGRIFT.

1. COUNTY COURT—*Appeal to District Court—Time of Filing Bond* Under Sec. 243 of the code, where, in the county court, a motion for a new trial is interposed in apt time, it has the effect to reserve the case for further consideration. An appeal bond filed within ten days after judgment formally entered, upon the denial of such motion, is in time. (292)

2. ——*Defective Bond—Amendment.* Under Rev. Stat. sec. 1539 an appeal is not to be dismissed for defects in the appeal bond if the appellant within a reasonable time shall file a sufficient bond. (293)

3. PRACTICE—*File Mark—Effect.* The file mark upon an appeal bond is controlled by the record, where this shows that the bond was lodged and approved at an earlier date, and in due time. (292, 293)

4. EXECUTORS AND ADMINISTRATORS—*Special Execution Against.* Action commenced and an attachment levied in the lifetime of defendant. The attached property was sold, pursuant to stipulation of the parties, and the money paid into court to await the result of the action. The defendant died during the pendency of the action, and the administrator being substituted, judgment was given against him. *Held* that notwithstanding the provisions of Rev. Stat. sec. 7209 it was proper to award a special execution, directing the sheriff to take and apply the proceeds of the attached property to the satisfaction of the judgment. (294)

Error to Montrose District Court.—Hon. THOMAS J. BLACK, Judge.

Messrs. CATLIN & BLAKE, for plaintiff in error.

Mr. JOHN GRAY, Mr. RALPH E. WALDO, and Mr. PHILIP W. MOTHERSIL, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

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The action was by defendant in error, William Vandegrift, as plaintiff below, against one H. S. Hanthorne, in the County Court of Montrose County, to recover a commission alleged to be due plaintiff for a sale of real estate. The complaint was filed February 10, 1912, and certain property of the defendant was attached. By stipulations between the parties the attached property was sold and the proceeds of sale placed in court to await the outcome of the cause. In August, 1912, the death of Hanthorne was suggested to the court, and the cause was continued in the name of Frank D. Catlin, Jr., Administrator, etc., as defendant. Defendant answered by general denial. Trial was had to a jury, and a verdict for defendant was returned on December 17, 1912. On the incoming of the verdict, in open court, notice of motion for a new trial was given, and the motion filed two days thereafter. On January 9, 1913, an additional motion for a new trial was filed. These motions were treated as one, upon which argument was had, and on January 11th were overruled and judgment rendered and entered of record for defendant in accordance with the verdict.

Plaintiff undertook an appeal to the District Court of that county. The appeal bond, as appears on its face, was approved January 21, 1913, but was indorsed "Filed this 23rd day of January, A. D. 1913." January 22, 1913, an order was entered in the cause in the County Court directing the transmission of the record to the District Court, in which it was recited "that the bond of appeal has been filed and approved in manner and form as required by law, and all other things necessary to be done therein have been done to complete this appeal," and on the 24th of that month the case was lodged in the District Court. Defendant appeared specially and filed a motion to dismiss the appeal, upon the

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grounds that it was not taken within the time prescribed by the statute, and that the appeal bond was defective, in that it does not comply with the provisions of the statute, and did not, therefore, confer jurisdiction upon the District Court, which was argued by counsel for the respective parties, and overruled on March 25, 1913. The order also contained a finding that the appeal bond was defective, but that there was an honest effort made to file a sufficient one, and ten days were allowed plaintiff in which to file such a bond or suffer a dismissal of the appeal by default. Defendant elected to stand on his motion to dismiss, and declined to appear further. Judgment was rendered against him for the amount prayed, upon trial to the court, the plaintiff having waived a jury. Defendant brings the case here for review on error.

The first matter urged is that the appeal bond from the County to the District Court was not filed within ten days after judgment, as provided by statute. This involves the question of when the judgment was rendered by the County Court. Plaintiff in error contends that, as the verdict was returned on December 17, 1913, and no order reserving the cause for argument or further consideration, or granting a stay of proceedings, was made, judgment was by operation of law rendered of that date, entry thereof being a purely ministerial duty, under and by virtue of section 243 of the Code of 1908, which reads as follows:

"When trial by jury has been had, judgment shall be entered by the clerk in conformity to the verdict, within twenty-four hours after the rendition thereof, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings; but such entry of judgment shall not prejudice any motion for a new trial made in due time."

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Defendant in error says that as a motion for a new trial was made in due time, argued by respective counsel, overruled and judgment rendered, in conformity with the verdict, on January 11, 1913, this is the date of the judgment. It is true the record discloses no order reserving the cause for argument or further consideration, or stay of proceedings granted, but it does show a motion for new trial interposed in due time upon notice given in court immediately after the return of the verdict, and judgment rendered on July 11, 1913, in conformity with the verdict, upon the overruling of such motion. The section quoted contains a provision the very purpose of which is to meet a situation like the one now before us. When the motion for a new trial was interposed in due time, it reserved the cause for further consideration. If this were not so, although a motion for a new trial was filed in apt time, still if the court should fail to dispose of it within the time allowed for perfecting an appeal, a litigant would then be deprived of his right of appeal, through no fault of his, contrary to the letter, sprit and purpose of the provision quoted. It was never intended that an injustice of this sort should be thus accomplished. The date of the order overruling the motion, upon which date judgment was formally rendered, in conformity with the verdict, is the date from which the ten days in which an appeal could be perfected began to run.

But plaintiff in error says that, even if such view be taken, the appeal bond was nevertheless filed on January 23rd of that year, more than ten days after judgment was rendered, and therefore the appeal failed. While it is true that the filing mark bears such date, it appears upon the face of the instrument that it was approved on the 21st day of January, 1913, within the statutory period. The order transferring the record to

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the District Court, which was entered on the 22nd of that month, recites that the appeal bond had been theretofore filed and approved. The record shows that the bond was lodged in the County Court on the 21st day of January and approved on that day. The date governing the time the appeal was made is that of lodgment and approval of the appeal bond.—*Cates et al. v. Mack,* 6 Colo. 401, 404.

It is next urged for a reversal that the appeal bond was insufficient to confer jurisdiction upon the District Court, in that it is not a compliance with the statute regulating such appeals, Section 1537 R. S. 1908. Upon this proposition the District Court, in overruling the motion to dismiss the appeal, found that although such bond was defective, there was an honest effort made to file a good and sufficient one, and allowed defendant to file an amended bond to conform to the statute. This action of the court was entirely proper and in harmony with the decisions construing the law respecting such amendment. It would have been error for the court to have denied such leave. Section 1539, R. S. 1908, reads in part as follows:

"Provided, further, that no appeal shall be dismissed on account of a defect or informality in the undertaking, or the insufficiency thereof, if the appellant or appellants shall, within a reasonable time, to be fixed by the court, file a good and sufficient undertaking."

Wheeler v. Kuhns, 9 Colo. 196, 11 Pac. 97; *Fuller v. Estate of Fuller,* 7 Colo. App. 555, 44 Pac. 72. The opinion in the case of *D. & R. G. R. R. Co. v. Paonia Ditch Co.,* 49 Colo. 281, 112 Pac. 692, has no application here, because there no request was made to file an amended bond and that question was not considered.

The remaining contention is that the court erred in ordering special execution, commanding the sheriff to

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take and apply the proceeds of the attached property upon the judgment. Section 7209, R. S. 1908:

"No execution shall issue upon any judgment against a decedent, * * * but such judgment shall be filed, allowed and paid in the same manner as other fourth class claims against such estate."

is cited to support the contention, that this judgment should have been filed, allowed and paid out of the estate as a fourth class claim. The record shows that at the commencement of the action certain property was attached and by stipulation converted into cash and held in court to be applied in payment of whatever judgment plaintiff might recover. The attached property was segregated from the estate of Hanthorne, prior to his death, and never came into the hands of the administrator, but the proceeds therefrom followed the suit on appeal to the District Court, and was under its exclusive jurisdiction and control. These proceeds were no part of the estate, and could become so only upon the contingency that plaintiff failed to recover judgment and sustain his attachment. This contingency never happened, and it was, therefore, entirely proper for the District Court to direct the application of the money to the partial satisfaction of plaintiff's judgment.

Judgment affirmed.

CHIEF JUSTICE MUSSER and MR. JUSTICE WHITE concur.

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[No. 8067.]

OLES v. MACKY'S ESTATE.

1. EXECUTORS AND ADMINISTRATORS—*Distribution—Stay of.* One claiming a share in the estate of a decedent, who is *prima facie* entitled thereto, and is diligently prosecuting her claim in the courts, is entitled to apply in the court of administration to stay a distribution which will so reduce the estate as to impair her right, until those to whom distribution is directed shall give bond for re-payment of the amounts distributed whenever she shall have established her right. (297)

To deny the application is a gross abuse of discretion. (298)

2. WRIT OF ERROR—*Who May Prosecute.* One who applies in the county court for a modification of an order for the distribution of a decedent's estate, thereby becomes party to the administration proceedings, and is entitled to a writ of error to review an order denying her application. (298)

Error to Boulder County Court.—Hon. E. J. INGRAM, Judge.

Mr. O. A. JOHNSON, Mr. T. A. MCHARG, Messrs. THOMAS, BRYANT, NYE & MALBURN, and Mr. JAMES H. BREWSTER, for plaintiff in error.

Mr. FRANK L. MOOREHEAD, guardian *ad litem* and Mr. HENRY O. ANDREW, for defendant in error.

The petitioner in her early childhood was by her father given into the custody of Andrew J. Macky, in consideration of his agreement to rear and educate her, and to make provision for her maintenance by preparing and having in his possession a legally executed will, bequeathing to petitioner an amount not less than one-third of his entire estate. The petitioner had no knowledge of the contract, and did not learn of its existence

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until some time after the death of Macky in 1907, who failed to make any provision in his will for her. Prior to any distribution of the funds and property of the estate, she brought an action in the District Court of Boulder County against the executor for the specific performance of this contract. A demurrer to her complaint was sustained. She elected to stand on her complaint, and the action was dismissed. She then brought the case here for review on error, with the result that the judgment of the District Court was reversed. 141 Pac. 489.

While that case was pending in this court the executor of the estate and certain legatees, petitioned the County Court for authority to distribute fifty thousand dollars of the funds of the estate, which was granted. Thereafter petitioner filed a petition in the County Court in which she prayed that the order of distribution be modified, so as to require the distributees of the fund to give bond, conditioned for the repayment into court of the amount so distributed, at such time as she should establish her right thereto. In her petition she sets out the contract upon which she relied to establish her right to one-third of the estate, which appears in full in *Oles v. Wilson,* 57 Colo. 246, 141 Pac. 489; and also the further facts upon which she predicated her right to the portion of the estate she claimed, all of which fully appear in the opinion to which we have referred. From the record it is made to appear that if the fund involved is distributed there will not be sufficient property in the hands or under the control of the executor to satisfy her judgment in the case she is prosecuting against the estate, in the event she is successful in that action. It likewise appears from the petition that she has proceeded in a diligent and orderly manner to establish her

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rights. The relief prayed was denied and petitioner has brought the matter here for review on error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

When it is made to appear, as it does, that petitioner *prima facie* is entitled to one-third of the estate, and that the distribution of the fund involved will deplete the funds and property of the estate in the hands of the executor or under his control to such an extent that should petitioner finally prevail in her action, there will not be sufficient property subject to the control of the executor to satisfy her judgment, the status of the estate should be preserved pending the final determination of her rights, or she should be protected in some appropriate way so that in the event she prevails her judgment can be satisfied. This is but simple justice, and we are of the opinion that when a claim against an estate is pending for adjudication it is error to order money paid to legatees, when by so doing sufficient will not be left in the hands of the executors to satisfy such claim, unless the claimant is secured against loss by such distribution. *In Re Denike's Estate,* 6 N. Y. Sup. 450; *Sherman v. Saylor,* 36 Ill. App. 356; *State v. Superior Court,* 38 Wash. 677, 69 Pac. 375.

Counsel appearing here for certain of the legatees contend that requiring a bond was purely discretionary with the County Court, and that the exercise of this discretion should not be interfered with on review. To some extent this contention is based upon the fact, that petitioner's claim was not filed within the period for presenting claims against an estate. Conceding that the matter presented to the court called for the exercise of discretion, the ruling is reviewable, and should be reversed when it appears there has been plain, palpable and gross abuse of such discretion. That there was such

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an abuse of discretion in refusing to require the legatees to give bond to repay the amounts received, if petitioner prevailed in her action, is evident, because if she was successful, funds of the estate, which should be applied to the satisfaction of her judgment would have been dissipated, and to that extent she would be prevented or at least, greatly embarrassed in enforcing the collection of her judgment. Petitioner's claim is not a demand against the estate within the statute requiring claims against an estate to be filed within a specified period.—*Oles v. Wilson, supra.* And hence, the cases cited which refused the exaction of a bond for the protection of a claimant, who had failed to file his claim within the period fixed by statute, are not in point.

The next proposition urged on behalf of the legatees is, that the order of the County Court refusing the prayer of petitioner is not reviewable, for the reason that she is a stranger to the proceedings in that tribunal. She was not originally a party to these proceedings, but became such by presenting her petition, requiring the legatees to give bond, which would enable her to reach the fund about to be distributed to them, in case she was successful in establishing her right to one-third of the estate.

Several other questions are urged on behalf of the legatees in support of their contention that the judgment of the County Court should be affirmed, none of which, in our opinion, have merit, or they are not presented by the record or have been determined adversely to their contention in *Oles v. Wilson, supra.* The vital question is, whether petitioner was entitled to the relief prayed, and as it is apparent from the record before us, she was, the judgment of the County Court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Judgment reversed.

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Mr. Chief Justice Musser and Mr. Justice White concur.

[No. 8075.]

McCave v. Colorado & Southern Railway Company et al.

Judgment reversed on the authority of *Willson v. Colorado & Southern Co.* 57 Colo. 303.

Error to Boulder District Court.—Hon. James E. Garrigues, Judge.

Mr. C. A. Irwin, and Mr. O. A. Johnson, for plaintiff in error.

Mr. Justice Gabbert delivered the opinion of the court:

Plaintiff in error brought suit against the Colorado & Southern Railroad Company, and the Denver, Boulder & Western Railroad Company, to recover damages for personal injuries and destruction of her property, caused by the alleged negligence of the defendants. At the conclusion of the testimony on the part of plaintiff, the defendants moved for a non-suit, which was sustained, and the action dismissed.

The damages for which plaintiff seeks to recover, were caused by the same explosion of powder in the circumstances fully narrated in *Willson v. Colorado & Southern Railway Company*, 57 Colo. 303, 142 Pac. 174; in which case the trial court sustained motions for non-

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suit. That judgment was reversed and the cause remanded for a new trial, for the reason that from the testimony the case should have been submitted to the jury. The case at bar is ruled by the Willson case, and for the reasons therein stated, it was error to grant the motions for non-suit and dismiss the action.

The judgment of the District Court is reversed and the cause remanded for a new trial.

Judgment reversed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 8079.]

O'ROURKE v. O'ROURKE.

1. CHANGE OF VENUE—*Waiver.* A defendant who after the erroneous denial of her motion for a change of venue voluntarily answers, and proceeds to trial without objection, waives her right to the change. (302)

2. DIVORCE—*Condonation—Plea of,* may be pleaded with the general denial. (302)

Error to Huerfano County Court.—Hon. HENRY BLICKHAHN, Judge.

Mr. M. J. GALLIGAN, for plaintiff in error.

Mr. CHARLES HAYDEN, Mr. R. E. FOOTE, Messrs. BARNETT & CAMPBELL, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

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On May 27, 1912, defendant in error, Michael S. O'Rourke, filed complaint in divorce, in the County Court of Huerfano County, against plaintiff in error, Adeline O'Rourke, alleging cruelty, adultery and desertion. Defendant interposed a motion to change the venue of the cause to Pueblo County, supported by affidavit of her residence in that county and service of summons there. Plaintiff filed an affidavit resisting the motion, stating his residence and lawful domicile to be in Huerfano County, and that defendant being his wife had her legal residence also in that county. The motion was overruled.

Defendant, for a first defense, denied the alleged acts of desertion, cruelty and adultery, and for a second, separate and independent defense, interposed a formal plea of condonation. In this plea it is alleged, in substance, that in June, 1909, plaintiff commenced an action against defendant for divorce in Pueblo County, setting up substantially the same facts that are relied upon for divorce in his amended complaint in this case, which former suit was dismissed after issue joined; also that in July, 1910, defendant brought an action against plaintiff in the same county for separate maintenance, which was dismissed on January 21st, 1911; and that in January, 1912, they cohabited and lived together as husband and wife.

Plaintiff filed a motion to strike that part of the answer relative to condonation, upon the ground that a general denial having been entered it was not competent for the defendant to interpose a plea of confession and avoidance, such as condonation, because it is antagonistic to, in conflict with and destructive of the defense tendered by the general denial. That motion was sustained. A replication was thereupon filed. Upon trial a jury returned a verdict for plaintiff, finding defend-

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ant guilty of cruelty and desertion, and judgment was entered thereon. Thereafter defendant filed a petition to set aside the decree and reopen the case, which was overruled. She brings the case here on error.

The motion of defendant for a change of venue, sufficiently supported as it was, should have been allowed. However, upon the overruling of such motion, she voluntarily answered and went to trial without further objection. This action reinvested the court with judisdiction and waived her right to the change, because the court had jurisdiction of the subject-matter of the suit, it having been brought in one of the three counties in which plaintiff might properly bring it.—*Christ v. Flannigan,* 23 Colo. 140; 146 Pac. 683; *Phoenix Indemnity Co. v. Gregor,* 39 Colo. 193, 88 Pac. 1066.

On the ground that denial and condonation are inconsistent, contradictory and antagonistic defenses, the court, on motion of plaintiff, struck the plea of condonation. This was reversible error. This action deprived the defendant of a defense to which she was entitled.—Mills' Ann. Code, § 59. It is unnecessary to discuss the argument of counsel upon this point, for this case is, in any event, plainly within the established rule.—*Koll v. Bush,* 6 Colo. App. 294, 297, 40 Pac. 579; *Carlile v. People,* 27 Colo. 116, 59 Pac. 48; *Hill v. Groesbeck,* 29 Colo. 161, 67 Pac. 167; *Conrey v. Nichols,* 35 Colo. 478, 84 Pac. 470; *Pike v. Sutton,* 21 Colo. 84, 39 Pac. 1084; *Denver Co. v. Gast,* 54 Colo. 17, 20, 129 Pac. 233.

Counsel for defendant in error adroitly and persuasively argue that there was included in the general denial averments which sufficiently presented the issue of condonation, and therefore, in the absence of any record showing the contrary, the evidence and instructions of the court not having been brought up, it must be presumed that this issue was in fact tried, submitted to the

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jury and determined adversely to the defendant. A complete answer to this contention is that the assumption of counsel that such a plea is found in the first defense is without foundation in fact, for it contains no sufficient plea of condonation or anything approaching such a plea.

The judgment is reversed and the cause remanded with directions to the lower court to permit defendant to file an amended answer, amending generally, as she may be advised.

Reversed and remanded.

Chief Justice Musser and Mr. Justice White concur.

[No. 8135.]

McCausland v. The People.

1. Criminal Law—*Malice*, is not a necessary element in a statutory offense, unless expressly made so, where there was no such offense at common law.* (305)

2. ——*Cruelty to Animals—Statute Construed.* The words "in a cruel or inhuman manner" in Rev. Stat. Sec. 1910, refer to the next preceding words, "carries in or upon any vehicles, or otherwise." They have no application to the other distinct offenses denounced in the statute.* (305)

3. ——*Information*, charging that the accused did "unnecessarily and cruelly beat and needlessly mutilate" an animal, is sufficient. (306)

4. Justice of the Peace—*Jurisdiction—Waiver of Defect.* Prosecution under Rev. Stat. Sec. 1910. The Justice issued a warrant for the arrest of the accused before the complaint was filed, and appointed the trial for a day more than ten days in the future. The accused being convicted, appealed to the county court and went to trial there on the merits. The appeal to, and trial on the merits in, the

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McCAUSLAND v. THE PEOPLE.

county court waived the defects in the procedure before the Justice, who had jurisdiction of the subject-matter.* (307)

*Syllabus by BAILEY, J.

Error to Routt County Court.—Hon. CHAS. A. MORNING, *Judge.*

Mr. CHAS. T. WHITAKER, Mr. ARTHUR L. WESSELS, *for plaintiff in error.*

Hon. FRED FARRAR, Attorney General, Mr. FRANK C. WEST, *Assistant* Attorney General for The People.

Mr. JUSTICE BAILEY delivered the opinion of the court:

This is an action commenced in a Justice's Court in Routt County, against William J. McCausland, plaintiff in error, resulting in a judgment against him in the County Court, to which he took an appeal from an adverse judgment in the Justice's Court. The complaint upon which trial was had charges that "William J. McCausland, on the 8th day of July, 1910, in said County, did torture, torment, unnecessarily and cruelly beat and needlessly mutilate one roan gelding (horse) contrary to the form of the statute." etc. Defendant interposed a motion to quash on the ground that the complaint or information does not state facts sufficient to constitute an offense or crime under the laws of the State of Colorado, which was overruled. Upon trial, defendant's motion for dismissal for want of sufficient evidence having been overruled, the court, the cause tried before it by consent, found defendant guilty and imposed a fine of $10 and costs. He prosecutes this writ of error.

The controlling question turns upon the order overruling the motion to quash, because, as it alleged, the

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offense is insufficiently charged. The sections of the statute for consideration read in part as follows:

"Every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, unnecessarily or cruelly beats, or needlessly mutilates or kills, or carries in or upon any vehicle, or otherwise in a cruel or inhuman manner, any animal * * * shall, upon conviction, be punished * * *, etc. § 1910, R. S. 1908.

"In this act the word 'Animal' shall be held to include every living dumb creature; the word 'Torture,' 'Torment' and 'Cruelty' shall be held to include every act, omission or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted or allowed to continue when there is a reasonable remedy or relief," * * * § 1923, R. S. 1908.

The statute embraces separate and distinct offenses. The offense charged was not a crime or misdemeanor at common law, and therefore malice is not a necessary ingredient, since not expressly made so by statute. 1 R. C. L. §§ 108-109.

It is contended that as the charge did not contain the words of the statute "in a cruel or inhuman manner" it was insufficient. These words relate to the phrase immediately preceding them, concerning the carrying of animals. They cannot be said to qualify any of the other several preceding words or phrases, for each of them in and of itself alone indicates a complete offense. The only construction possible, and in accord with the plain purpose, terms and meaning of the act, is that these words are necessary and properly apply to only that part of the act above specified, thus completing the statement of the offense. That portion of the statute relating to the carrying of animals, when properly understood, must be held to mean that every person who carries in

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or upon any vehicle, or otherwise carries, in a cruel or inhuman manner, any animal, shall upon conviction be punished, etc. This is only one of several offenses embraced in the statute.

It is further contended by plaintiff in error that a charge in the language of the statute does not sufficiently set out the facts which constitute the offense; that the words of the statute are so general and broad as to embrace cases which fall within its terms, but not its spirit, and therefore it was necessary to allege in the complaint specific facts to bring the case within the inhibition of the law. Among other things, the complaint charges that the defendant did "unnecessarily and cruelly beat" one roan gelding (horse). This was sufficient.—*State v. Watkins,* 101 N. C. 702, 8 S. E. 346; *State v. Allison,* 90 N. C. 733; *Commonwealth v. McClellan,* 101 Mass. 34; *Commonweath v. Lufkin,* 7 Allen (Mass.) 579. In Bishop on Statutory Crimes, 3rd ed., section 1115, it is said:

"Under the statutory word 'beat,' as in the expression 'cruelly beat any horse,' it is sufficient to say, in allegation, that the defendant, 'did beat' the animal, not specifying more minutely the beating. For the idea is simple, and this word alone adequately particularizes the act and the instance."

In *State v. Watkins, supra,* the indictment charged that the defendant "did * * * torture, torment and act in a cruel manner," etc. The court said:

"These are words of the statute, but they are not precise in their meaning; they designate rather than define the offense or suggest the acts that constitute it; they do not, of themselves, import what is meant by the statute; in pleading, they need to be aided in charging acts that certainly imply what is meant by the terms torture and torment, and they should be so charged as that

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the court can see that they do. If the charge contained in the proper connection one or more of the words beat, wound, shoot, kill, and the like, such precise and pertinent words would have implied the offense forbidden."

Upon principle and authority we conclude that the offense was sufficiently charged.

Objection was made in the County Court to the jurisdiction of the Justice's Court, and also to that of the County Court on appeal, because of lack of jurisdiction in the Justice's Court. The objections urged are based on the claim that the Justice set the case for hearing more than ten days off, contrary to the statute, and issued the warrant before the complaint was filed. The Justice undoubtedly had jurisdiction of the subject-matter, and since the objections under consideration go to matters of form and procedure merely, they were such as could be and were waived by the defendant when he took an appeal to the County Court, which also had jurisdiction of the subject-matter, and there contested the charge on its merits.

The evidence supports the judgment, and it should be affirmed.

Judgment affirmed.

Chief Justice Musser and Mr. Justice White concur.

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[No. 7673.]

LIBERTY BELL GOLD MINING COMPANY v. MOORHEAD MINING AND MILLING COMPANY.

DAMAGES—*Trespass to Metalliferous Mines.* In the case of an innocent trespass, and the subtraction of ore from a metalliferous mine, the measure of damages is the gross value of the ore before disturbance; not the net product or gross proceeds. Where the trespass is wilfull, and the wrong-doer has milled the ore, or sold it, the plaintiff recovers the gross proceeds realized, without any deduction for the increased value which the trespasser has created by his efforts.

Error to San Miguel District Court.—Hon. SPRIGG SHACKLEFORD, Judge.

MESSRS. MACBETH & MAY, for plaintiff in error.

Mr. H. M. HOGG, Mr. W. L. HOGG and Mr. E. B. ADAMS, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. The Moorhead Mining and Milling Company, plaintiff below, defendant in error, owns the Franklin lode mining location situated in Upper San Miguel mining district, and the Liberty Bell Gold Mining Company, defendant below, plaintiff in error, owns the Lucky Boy, Tariff, Overlook, Ione and Winner lode mining locations, all joining the Franklin. A main vein, called the Liberty Bell vein, traverses the mountain, on the strike for miles, in an easterly and westerly direction. Two secondary veins to the main vein apex upon the Franklin, called by defendant the S. Hanging Wall and the Winner veins, and by plaintiff, Franklin No. 1 and the Waters veins. The dip of all these veins is southerly, and on the dip they pass under and through the Franklin and extend far

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beyond the plane of its southerly side line, and unite with the main vein, forming but one vein beyond the junction. The Moorhead Company brought this action at Telluride against the Liberty Bell, to recover damages for underground trespass by the latter upon the Franklin by driving beneath its surface underground workings into its territory and mining and removing ore from beneath the Franklin surface; also from veins apexing upon its surface, after they pass on the dip outside of and beyond the southerly sideline of the Franklin extended downward vertically, and to enjoin further trespassing. The controversy turned upon whether the veins apexed upon Franklin or Liberty Bell territory. In the early stages of the litigation each party claimed the apexes of all these veins upon its territory, and extra-lateral rights; that is, the right to follow the veins on the dip, under and through the Franklin surface, and beyond its vertical southerly sideline. Since the finding of the lower court, they abandon this position. The court found the main vein apexed upon Liberty Bell territory, and the result or effect of the decree was to award this vein to defendant with extra-lateral rights. It found the secondary veins apexed on the Franklin and awarded plaintiff these veins with extra-lateral rights down to the junction or union with the main vein. It refused to grant an injunction against the Liberty Bell from working the main vein under, through and beyond the Franklin, but granted an injunction restraining defendant from working the two minor veins from their apexes down to their junction with the main vein. With the injunctive decree, both parties express themselves here as content. Defendant admits the decree allows it to work all the ground to which it is entitled, viz.: all the main vein and extra-lateral rights thereon; that plaintiff owns the secondary veins on which defendant trespassed and mined,

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removed and milled ores therefrom and sold the finished product, all the proceeds of which it appropriated to its own use; it takes no issue with the decree enjoining dedefendant from further trespassing upon these secondary veins; and plaintiff abandons its original claim of ownership to the main vein. These concession and admission in the briefs and oral argument render it unnecessary to consider but two assignments of error: First, did the court refuse to properly instruct the jury upon the measure of damages for willful trespass? Second, the court erred in failing to confine and restrict the jury in awarding damages, to the two secondary veins; but permitted them to roam over the whole case unrestricted, and the jury may have based some damages upon ore removed from the main vein.

2. Defendant admits plaintiff owned the secondary veins upon which it trespassed for over three years and removed large bodies of ore which it milled, and sold the finished product and applied all the proceeds to its own use. The only excuse it now offers for the trespass is that a great portion of the ore was taken innocently with an honest mistake of plaintiff's right thereto; that the apexes of the veins were buried under a deep wash and their location could only be calculated; that in its deep mining beneath the surface, defendant made a mistake in calculating the location of tho tops of the veins, which, as soon as it ascertained, it ceased mining thereon except that in cleaning up, about 300 tons of ore was removed from the Winner vein after the mistake was discovered.

3. In case of innocent trespass by mining and milling metalliferous ores, where the trespasser sells the finished product and applies the proceeds to his own use, the owner should be reimbursed for his actual loss and his damages are compensatory only. The measure of

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damages is the gross value of the ore in place before it was disturbed, not the net product or gross proceeds. The damages may be ascertained by deducting from the enhanced value or gross proceeds, the cost of making the product at the time of conversion. It was agreed on the trial in this case, where the trespass was innocent, the deduction should be $4.64 per ton.

4. The court in effect told the jury in willful trespass the measure of damages was the enhanced value or gross proceeds realized from the ore at the time of the conversion with no deductions; that is, the owner could recover the full amount realized by defendant from the ore at the time of conversion without deductions for any cost in making the finished product from the raw material; that in willful trespass of this kind, the defendant should be at the expense of mining and milling the ore for the benefit of the owner. This is complained of as error. Defendant admits in willful trespass, it was entitled to no deductions for the cost of mining and bringing the ore to the mouth of the mine, but claims it was entitled to deductions thereafter for milling and transportation charges; in other words, that the conversion took place at the mouth of the mine and not at the time it applied the gross proceeds or finished product to its own use. This contention has lately been decided adversely to defendant by the United States Circuit Court of Appeals.—*Liberty Bell Co. v. Smuggler Co.*, 122 U. S. C. C. A. 113.

Defendant's contention is based upon cases of trespass upon coal veins, where the conversion usually takes place at the collar of the shaft, and hence are not applicable here. In case of willful trespass upon metalliferous veins, where the trespasser has mined, milled and sold a finished or enhanced product, the conversion takes place when he applies the proceeds to his own use, and

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the measure of damages is the enhanced value or gross proceeds realized from the ore without deductions on account of any value the trespasser may have bestowed upon the ore by his labor.

5. The jury returned a general verdict for $46,072.50. No special finding was made or requested. Complaint is now made that the jury may have based some of its damages on ore taken from the main vein, which the court found belonged to defendant. Plaintiff's evidence of ore taken from the S. Hanging Wall vein, was 5445 tons of the value of $74,324.25; from the Winner vein 12220 tons of the value of $83,707.00, making a total tonnage from these two veins of 17665 tons, and a total value of $158,029.00. Allowing from this the agreed deduction of $4.64 per ton, it leaves as the net value of the finished product, according to plaintiff's minimum values, $76,165.65. Defendant's testimony showed an admitted trespass on the two veins of 2842 tons of the value of $15,996.00, and the average between plaintiff's minimum and defendant's maximum values gives $46,035.08, or within $35.00 of the verdict. Plaintiff claimed in its complaint a tonnage in excess of 100,000 tons and a damage of over $500,000.00, and if the jury had based its verdict on the main vein, it would seem they must have found much larger damages than they did. From defendant's own testimony, had they allowed damages on the main vein, the verdict would have been $138,727.36. The court found the trespass was on the secondary veins owned by plaintiff, and not on the main vein owned by defendant; it instructed the jury that each party to the action was entitled to all the veins, throughout their entire depth, the top or apex of which lay inside the surface lines of the location extended downward vertically, although such veins so far departed from a perpendicular in their downward course as to

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extend outside the vertical sideline of the claim. It adopted the finding of the jury and entered judgment on the verdict which it refused to set aside, showing that the court and jury were in accord as to the damages and the court considered that the jury limited the damages to the same veins upon which it granted the injunction.

We are of the opinion plaintiff recovered damages for trespass and conversion upon the secondary veins only. Judgment affirmed.

Affirmed.

Decision *en banc.*

[No. 7754.]

DENVER TRACKAGE & IMPROVEMENT COMPANY v. COLORADO & SOUTHERN RAILWAY COMPANY.

1. BOUNDARIES—*Tax Deed*, does not pass title to premises not within the description. (317)

2. LIMITATIONS—*Color of Title.* A deed is color of title only to the premises described therein. (318)

The premises in controversy are marked A in the following plat. Those which the court found were described in the tax deed are marked B.

The line "A—B," is the line drawn by the assessor as mentioned in the opinion.

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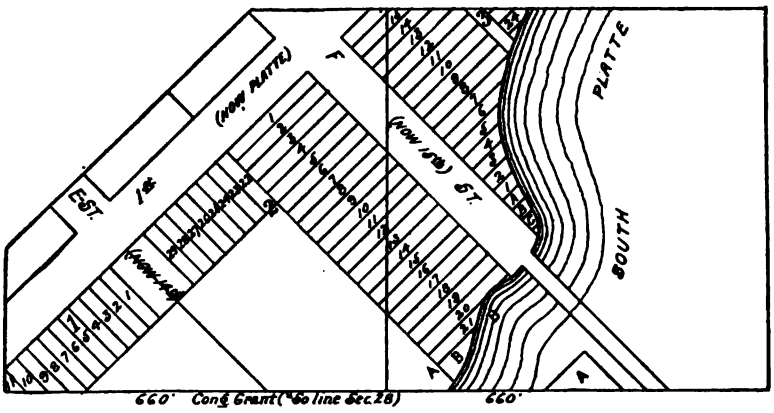

Error to Denver District Court.—Hon. HARRY C. RIDDLE, Judge.

MESSRS. THOMAS & THOMAS, for plaintiff in error.

MR. E. E. WHITTED, MR. A. S. BROOKS, and MR. F. M. STUART, for defendant in error.

MR. JUSTICE GABBERT delivered the opinion of the court:

A dispute having arisen between the parties to this proceeding over the ownership of a tract of land, plaintiff in error brought an action to enjoin defendant in error from taking possession of the property, and to quiet title. The judgment was in favor of defendant, declaring it to be the owner of the premises and entitled to the possession thereof.

Plaintiff deraigned title through a tax deed, from which it appears the tract was assessed, sold for taxes and conveyed by the tax deed under the following description: "That part of block 2, not subdivided, lying southeast of lot 21 and north of the line of the Congres-

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sional Grant, in block 2, in Kasserman's Addition to the City of Denver."

Defendant deraigned title by deed containing the following description: "Beginning at a point where a line drawn through the center of the easterly pier of the Fifteenth Street bridge intersects the line of Fifteenth Street on the south side, and running thence in a line at right angles to Fifteenth Street to a point where said perpendicular to Fifteenth Street intersects the south line of Section 28, Township 3 South, of Range 68 West: thence from said point of intersection with said south line of said Section 28 to the intersection of said south line with the said south line of Fifteenth Street; thence along said south line of Fifteenth Street to the point of beginning."

Both deeds appear to be regular and valid, and the crucial question is whether the description in each covers the same tract. If they do, plaintiff is the owner of the tract involved, and entitled to its possesion, otherwise not.

In February, 1871, Steven D. Kasserman was the owner of the E. ½ of the S. W. ¼ of Section 28, Township 3, South, Range 68 West, which, according to the plat on file in the office of the County Clerk of the City and County of Denver, he laid out and platted into lots, blocks, and unsubdivided portions, under the name of Kasserman's Addition to the City of Denver. The South Platte River runs diagonally across the southeasterly portion of the 80 in question, and the tract in dispute lies south of the river. The land conveyed by defendant's deed is definitely described by metes and bounds, without reference to lot, block or addition. The description in the deed of plaintiff is also definite, and embraces the tract in dispute, if block 2 extends across the river to the line of the Congressional Grant. So that the question

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upon which the rights of the parties must be determined is to ascertain the southerly line of block 2. It is clear from the plat that all blocks platted east of 15th street, which runs through the addition, only extend to the northwest or left bank of the river, that is to say they are wholly located on the north side of the river, and we think from the same source it is equally clear that the south boundary line of block 2 is the same as the other blocks, namely, the northwest or left bank of the river, and does not include any land on the south side of the river, because it appears from the plat that the left bank, which is the southerly line of all the blocks mentioned, is definitely fixed by a meander line indicating the left bank of the stream. There is a further reason, however, which is conclusive upon this court in determining the southerly line of block 2. The trial court found as a fact, from oral testimony in connection with the plat, that this boundary was the left bank of the river. Each side produced witnesses, some of whom, from an inspection of the plat, testified that the southerly line of the block was the left bank of the river, and others, the line of the Congressional Grant. This testimony was introduced upon the theory that the southerly line of block 2 was not definitely fixed by the plat. We think the plat shows that this line is the left bank of the river, as previously stated, but assuming that the plat was so indefinite and uncertain that the question of the southerly boundary line of block 2 was a subject upon which it was competent to hear oral testimony, then the finding of fact by the trial court upon the conflicting testimony cannot be disturbed on review. In nearly all of our reports, cases may be found wherein it is announced that a finding of fact, in such circumstances is conclusive upon this court.

Plaintiff and his predecessor have acted entirely in

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good faith, but the purchaser at the tax sale and the assignee of the certificate of sale have been misled by the action of the assessor, who in 1883 assumed to re-plat a part of block 2, as shown by a copy of the block book prepared for that year. According to the plat filed by Kasserman, the southerly line of lot 21 in block 2, was the meander of the left bank of the river. The assessor however, assumed that the southerly line of lot 21 was another line not appearing upon the plat, which would make the width of the west front of that lot the same as others in the block, and in his block book drew this imaginary line, which left a small triangular piece between that line and the river, the southwest corner of which was the north line of the Congressional Grant. The tax sale, under which plaintiff claims the property, was for the delinquent taxes of 1883, but in the circumstances above narrated, it is clear that the tract sold was the triangular piece above mentioned, which in fact was a part of lot number 21 in block 2. In other words, it appears from the block book that the assessor in 1883, assessed the triangular piece shown by the block book for that year, lying between what he assumed to be the southerly line of lot 21 and the river, as the unsubdivided part of block 21, lying southeast of lot 21, and in as much as it is apparent from the plat filed by Kasserman, that the southerly line of block 2 was the left bank of the river, it follows that it was this triangular tract which was sold for the taxes of 1883. Another significant fact is, that had it been the intention of the assessor to assess the premises in dispute, he would not have assumed to plat the triangular tract, to which we have referred, but would have assessed it as that portion of block 2 not subdivided, lying south of lot number 21, without reference to the Congregational Grant line.

Plaintiff relies upon the provisions of sections 2923

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and 2924, Mill's Statutes, which provide in substance, that every person in the peaceable and undisputed possession of lands, under claim and color of title, made in good faith, or whenever any person having color of title made in good faith to vacant lands, shall pay all taxes legally assessed thereon for five successive years, he shall be deemed and adjudged the owner of such land to the extent and according to the purport of his paper title. These sections were repealed in 1893, and in lieu thereof what are now sections 4089 and 4090, R. S. 1908, enacted.—*Ballard v. Golob,* 34 Colo. 417, 83 Pac. 376. So far as any question is involved they require the payment of taxes for seven successive years under color of title made in good faith, but in the circumstances of this case do not aid plaintiff in establishing his title to the disputed premises, for the reason that the tax deed, under which plaintiff claims, did not include these premises, and, hence, did not constitute color of title to them.—*Laughlin v. City of Denver,* 24 Colo. 255, 50 Pac. 917.

Neither does section 5733, R. S. 1908, which provides that an action for the recovery of land sold for taxes shall not lie, unless brought within five years after the execution and delivery of the tax deed, have any application, because the subject matter of controversy was not sold for the taxes of 1883. In other words the rights of the parties are not dependent upon the validity of the tax deed, but whether it embraces the premises involved.

In brief, as previously stated, the right of plaintiff to the premises in dispute, depends upon whether block 2 extends south of the river, and as it does not, none of the sections of the statute of limitations considered, are applicable, and cannot be made the basis upon which plaintiff can assert title.

The judgment of the District Court is affirmed.

Judgment affirmed.

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Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

[No. 7770.]

CHENEY v. BIERKAMP ET AL.

1. VENDOR AND VENDEE—*Non performance by Vendor—Remedies of Vendee.* Where the vendor fails to perform a substantial covenant on his part the vendee may rescind and recover damages, or may affirm the contract and sue for the damages occasioned by the vendor's failure to perform. (323)

These remedies are inconsistent, and where the vendee has made his election he must stand or fall by the position so first assumed. (323)

2. ——*Contract Construed.* Agreement for the sale of five acres of land. The agreed price, and the reasonable value was $2500.00. During the negotiation question arose whether about one-tenth of the tract was above the lateral by which the land was irrigated, and the vendor agreed, if this should prove to be the case, to provide means by which water could be made to cover this elevated part. *Held* this provision imported that the vendor should either raise the lateral, or grade down the elevation; and it appearing that the change in either manner would not have exceeded in cost about $75.00, *held* further that the provision was not an essential part of the agreement, a condition precedent, nor a dependent covenant, but a minor detail, for default in which the vendee might be compensated in damages; and that he was not entitled to rescind for the vendor's failure to perform it. (324, 325)

3. PRACTICE—*Change of Issues—Power of the Court.* The court has no power to change an action for the rescission of a contract to an action for damages, without the consent of both parties. (325)

4. PLEADING—*Amendment Under Order of Court—Effect—Waiver.* Action to rescind a contract. The court, against the objections and exceptions of both parties ordered plaintiff to file a complaint demanding damages in lieu of rescission. Plaintiff, protesting and expressly reserving all rights, complied with the rule. *Held* that he waived no right. (326)

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5. PLEADING—*Amendments*, are largely in the description of the court. The refusal to permit plaintiff to set up, more than a year after the institution of the action, a new ground for the relief which he demands is not an abuse of discretion. (326)

Error to Denver District Court.—Hon. HARRY C. RIDDLE, Judge.

Mr. CLARENCE J. MORLEY, for plaintiff in error.

Mr. L. WARD BANNISTER, Mr. LEROY MCWHINNEY, for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

The plaintiff in error brought this action to rescind a contract for the purchase of five acres of land and water, and to secure the return of that portion of the purchase price then paid, etc., for the alleged reason that the defendant Bierkamp, who sold him the land, refused to comply with the terms of the contract to put it all under irrigation for the season of 1910.

The defendants admit the execution of the contract, deny any refusal to comply therewith, aver that the land was under irrigation by a lateral from the Highline Canal, allege that during negotiations a question arose whether about one-tenth of it was lower or higher than this lateral, upon account of which it was agreed that there should be inserted in the contract a proviso whereby Bierkamp would agree, in case this portion was too high, to put it under irrigation, that is, would provide a means by which water from this lateral or otherwise from the canal, could be made to cover all the land; that this proviso meant that Bierkamp should do this by raising or changing the lateral or by shaving off the top of the land, thereby lowering its surface, and that either could be done for not to exceed $100. They deny that

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the agreement to put this piece under irrigation was any particular consideration for the contract, or for the $200 paid; allege, that the real consideration was possession and agreement to convey, that plaintiff took possession, the reasonable value of which was the agreed price, viz, $2,500; and that the plaintiff refused to permit them to comply with this provision of the contract, etc. By cross-complaint defendants allege, the execution of the contract, its assignment to the defendant corporation, the plaintiff's possession, the agreement to put it all under irrigation by lowering the portion higher than the lateral, or changing the lateral, the plaintiff's refusal to allow them to do so, and his refusal to continue his payments of $10 per month and interest, upon account of which the corporation served notice on him of its cancellation of the contract, etc., and that he notified it that he would make no further payments or further comply with its terms. The corporation alleged damages in excess of the sum paid, and its right to retain the amount then paid as liquidated damages, etc., with a prayer for cancellation, etc.

By replication the substance of the new matter in the answer and certain portions of the cross-complaint were denied. A jury was empanelled to whom two interrogatories were submitted, covering one phase of the plaintiff's contention; they were answered in his favor; namely, first, that the defendants did not offer to put said entire five acres under irrigation either by lowering its surface or by building a new lateral; and second, that they were not denied this privilege by the plaintiff. The court made findings that at that time neither was entitled to a rescission of the contract; the defendants, because they had not carried out its terms in placing all the land under irrigation; the plaintiff, because this was a collateral or an independent promise, and not made a part

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of the consideration for the conveyance of the land and water. Both sides excepted to these findings. The court, upon its own motion, then ordered, that an interlocutory decree be entered, which would reaffirm the contract, and provide that an issue be framed on the difference in value of the land, had it all been put under irrigation as provided by the contract, and its present value, without having been so placed under irrigation, and that this amount should be applied upon the payments due the defendant corporation under the contract so far as it would go, the decree then to be made final requiring the plaintiff to pay the balance as it became due, and upon its completion the defendant company to make the conveyance provided by the contract, etc. Both parties objected to this order. The plaintiff filed a motion to vacate it, etc. This motion was denied, and the interlocutory decree entered. The defendants filed a motion to withdraw the decree which was likewise denied. The decree commanded the plaintiff, within twenty days, to file a supplemental complaint setting forth his claim for damages, etc on account of the breach of the contract concerning the irrigation clause, which damages were to be in conformity with the measure fixed therein. It gave the defendants twenty days thereafter to plead thereto, and the plaintiff ten days to reply, and provided further that when issues were thus joined it be set down for trial by a jury on the question of such damages only, and that the cause be continued for this purpose. Both parties excepted to this decree and further pleadings were filed by the plaintiff under objections and exceptions, and by reason only of complying with its terms, and without waiving any rights upon account of so doing. On these subsequent pleadings the plaintiff was allowed a credit of $200 for damages upon account of Bierkamp's failure to comply with the irrigation clause of the contract, and judgment

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was given against the plaintiff for $247.75, being the remainder of the deferred payments then due on his note and contract after the allowance of this credit.

What transpired after the issuance of the interlocutory decree is immaterial, as neither the issues made by the original pleadings nor the findings of fact were in harmony therewith. By this decree the court created and assumed jurisdiction of a new cause of action not presented by any pleading, or sought by either side, but objected to by both. Under his version of the facts the plaintiff had his election of two remedies, namely, to rescind the contract and recover the usual damages in such cases; or, to affirm the contract and sue for damages on account of its non-compliance. These remedies are inconsistent, not concurrent; both were open to the plaintiff and when once he made his election to rescind, etc., he was bound thereby, at least so far as this action is concerned, and upon this issue he should have been allowed to stand or fall.—*Cole v. Smith,* 26 Colo. 506, 58 Pac. 1086; *Wilson v. New United States Cattle-Ranch Co.,* 73 Fed. 994, 20 C. C. A. 241; *Breckenridge Mer. Co. v. Bailif,* 16 Colo. App. 554, 66 Pac. 1079; *Newman v. Bullock,* 23 Colo. 217, 47 Pac. 379; *Hummel v. Moore* (C. C.) 25 Fed. 380; *Gallup v. Wortmann,* 11 Colo. App. 308, 53 Pac. 247; *Venner v. Denver Union Water Co.,* 15 Colo. App. 495, 63 Pac. 1061.

In *Anthony v. Slayden,* 27 Colo. 144, 60 Pac. 826, it was held that, where a plaintiff has elected one of two inconsistent remedies, he may not be permitted by an amendment to choose the other. This means, of course, over the objection of the other party. In the Slayden case the action was originally for damages account of breach of contracts. By an amended complaint the plaintiff sought to rescind the contracts; it was held that the change was not admissible. In the present action, over

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the objections of plaintiff and defendants, the court ordered that the action be changed from one to rescind the contract, which was sought by both parties, to one in damages account of its alleged breach by the defendants. This it had no right to do.

At the time of ordering the interlocutory decree, the court found that the agreement to put the land under irrigation before the next irrigation season, was a non-essential and wholly unimportant feature of the contract and that the defendants' failure to perform did not entitle the plaintiff to rescind. We agree with this finding. The record discloses, that only about one acre of the land was affected by this clause, which, if necessary, was to be irrigated by either moving or raising the lateral, or lowering the surface of the land; that either could have been effected at a cost of about $75 and that the defendant Bierkamp was to have five or six months after the execution of the contract to do this; that when the contract was executed, plaintiff paid $200 as a part of the purchase price and continued to make installment payments, as per its terms, until August of the next year, and also went into possession. The breach of this clause was not of the essence of the contract; it was not an essential part of the consideration; it was not a condition precedent, or a dependent covenant. On the other hand, it was a minor detail for which the plaintiff could be thoroughly compensated in damages; it was to be effected long after plaintiff had paid a part of the purchase price and had entered into possession; it was wholly distinct and separable from the other and principal agreements whereby the defendants agreed to sell, deliver possession and convey title to the land and water of an approximate value of $2500 unaffected by this clause, and all of which could be performed without performance of this clause, which it would cost about $75

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to comply with, and which cost the plaintiff could have offset against the unpaid balance of the purchase price. Under such circumstances the plaintiff was not entitled to rescind.—Page on Contracts, vol. 3, § 1450; *Luce v. New Orange Industrial Ass'n,* 68 N. J. Law, 31, 52 Atl. 306; *Kauffman v. Raeder,* 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Burge v. Cedar Rapids & Mo. R. R. Co.,* 32 Iowa, 101; *Crampton v. McLaughlin Realty Co.,* 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823; *Brevoort v. Hughes,* 10 Colo. App. 379, 50 Pac. 1050; *Anglo-Wyoming Oil Fields v. Miller,* 117 Ill. App. 552; *Weintz v. Hafner,* 78 Ill. 27; *Bloomington Electric Light Co. v. Radbourn,* 56 Ill. App. 165.

The defendants, although objecting to it, etc., now contend that the plaintiff cannot be heard to complain concerning the interlocutory decree, because he complied with it in filing supplemental pleadings. We cannot agree with this contention; its language is mandatory; it was objected to and complied with by the plaintiff under protest, and without waiving any right, etc., the plaintiff had elected between two inconsistent causes of action, as he had a right to do. The defendants, by cross-complaint, plead their election to rescind. Each sought to rescind. No other issue was presented. The contention was the grounds; if the plaintiff's he was entitled to a return of the amount then paid, etc.; if the defendants' they were entitled to retain the payments made, etc. Neither was asking any other relief upon account of its non-performance. The judgment discloses that plaintiff was owing in excess of the amount allowed for damages for defendants' non-compliance with the irrigation clause. Under such circumstances the plaintiff may have selected his remedy, preferring, could he not rescind under his theory, that defendants be allowed to keep the amount paid as liquidated damages, as they

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had declared their intentions to do. The final judgment was not responsive to these issues and as the plaintiff objected and excepted to all process by which it was secured, we think he saved his right to complain.—*Archuleta v. Archuleta,* 52 Colo. 601, 123 Pac. 821; *Travelers Insurance Co. v. Redfield,* 6 Col. App. 190, 40 Pac. 195.

The defendants' position is rather inconsistent concerning this. They also objected to the decree and had the result been more favorable to the plaintiff and less favorable to them, it is quite likely that they, instead of him, would now be complaining concerning it.

Error is assigned upon the court's refusal to allow the plaintiff, by amendment, to set forth an additional reason why he was entitled to rescind, the contract, namely, that his execution of it was secured through fraud, false representations, etc. The defendants claim that this amendment attempts to state a new cause of action but in fact states none, etc. We think it unnecessary to determine these questions. The filing of an amendment is largely within the discretion of the trial court. The record discloses that this one was not offered until more than a year after the suit was begun and about eight months after the interlocutory decree was entered, which had it been as it should, would have included a final judgment against the plaintiff. Under such circumstances we cannot say that the court abused its discretion in refusing it when it did, eliminating all other questions concerning it.

For the reasons stated the judgment is reversed and the cause remanded with instructions to enter a decree in favor of the defendants on their cross-complaint, to include a cancellation of the contract and note, they to retain all payments made up to the date of the judg-

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ment as liquidated damages. The costs of the trial will be taxed to the plaintiff. Each side to pay its costs here.

Reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

[No. 7814.]

DENVER & RIO GRANDE RAILROAD COMPANY v. DOYLE.

1. PASSENGER CARRIER—*Baggage—Liability of Carrier.* So long as a railway company has charge of the baggage of the passenger as a common carrier, it is liable as an insurer. It is its duty to have the baggage ready for delivery within a reasonable time after it reaches destination. (332)

If the passenger fails to call for it within a reasonable time it is the duty of the carrier to store it in some suitable place; thereafter it is liable for its loss, only in case it is convicted of negligence occasioning the loss. (332)

On the afternoon of August 15th a valise arrived at a day station where there were few arrivals, and the station house was closed during the night. The valise not being called for was stored in the baggage-room of the station, a substantial building, the doors and windows of which were equipped with ordinary locks, all which were securely fastened on the occasion in question. During the night of the 16th, the building was entered by burglars, and the valise carried away. No sufficient excuse was shown for the passenger's failure to call for the baggage before the loss. *Held* the railway company were not liable. (331, 333)

2. ——*Reasonable Time.* The time within which the passenger should call for his baggage is measured from its arrival, not that of the passenger, at destination. (332)

3. ——*For the Court.* Where the facts are not disputed what constitutes reasonable time is for the court. (332)

4. ——*Duty of Passenger—Excuse for Delay.* Ordinarily it is presumed that the passenger and his baggage will go by the same train. If he travels by a later train and for that reason is delayed

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beyond a reasonable time in removing his baggage, it seems he must show a sufficient reason for his conduct. (331)

A lady in feeble health, intending to travel at a season when, as she must have been aware, she might have difficulty in procuring accommodation upon the sleeper, went to the station only a few minutes before train-time. She first checked her baggage, and then applied for a berth in the sleeper. Not being able to secure it she postponed her journey, permitting her baggage to go forward, upon the train upon which she had checked it. The baggage arrived at destination on the afternoon of the 15th, the lady not until the 17th. In the meantime, without fault of the railway company, the baggage was stolen. *Held* she had failed to excuse her omission to call for the baggage in reasonable time. (333, 334)

Error to Mesa County Court.—Hon. WALTER S. SULLIVAN, Judge.

Mr. GEORGE P. STEELE, Mr. E. N. CLARK and Mr. R. G. LUCAS, for plaintiff in error.

Mr. HENRY R. RHONE and Mr. J. H. BURKHARDT, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

This action for damages is on account of the failure of the railroad company to produce and deliver a suitcase when it was called for, which it, as a common carrier had received as baggage for transportation.

1. The facts are admitted, and there is no conflict in the testimony. Mary M. Doyle came to Denver August 9, 1911 from her home at Clifton, Colorado, where she had purchased a round trip ticket over the D. & R. G. Railroad. She started to return on the evening of the 14th and upon arriving at the Union Depot, first checked her suitcase to Clifton, and then went to the Pullman office to secure a sleeper berth, which she was unable to do, for the reason that they were all sold. Feeling

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that she was physically unable to travel at night without Pullman accommodations, she remained in Denver without informing the company that she did not intend to travel on the same train with her baggage, and the next morning, the 15th, went to Colorado Springs where she endeavored to secure a berth on the night train, and was again informed that they were all sold. She remained at Colorado Springs until the morning of the 16th, secured a sleeper and left that night, arriving at Clifton on the afternoon of the 17th, where she called for her baggage which the company failed to deliver, and later she was informed by the agent, that the depot had been burglarized the night before and her suitcase stolen.

In the court below, plaintiff tried the case upon the theory that under these facts, the company was accountable as a common carrier and insurer of the baggage, without proof of negligence, and rested without attempting to prove negligence. Defendant then interposed a motion for a non-suit upon the ground that it was not liable as an insurer or common carrier; that it was only accountable to the plaintiff as a bailee or warehouseman, and no negligence having been shown, plaintiff could not recover. This motion was overruled. Defendant then introduced its evidence, from which it appeared that Clifton was a small day station, the agent remaining on duty from 8 A. M. to 8 P. M.; that the suitcase in question arrived on the afternoon of the 15th, and being unclaimed, it was stored in the baggage room used for that purpose; that on the night of the 16th, the depot was burglarized and the suitcase, with other property, stolen; that the depot was a substantial building with doors and windows equipped with ordinary locks and fastenings; that when the agent left at 8 o'clock on the night of the 16th, the doors and windows were securely locked and fastened; that the next morning it was discovered that an

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entrance had been forced through a window and the building burglarized.

The court, in its instructions, after stating the issues, told the jury that they should determine from the evidence and circumstances whether plaintiff called for her baggage within a reasonable time after it arrived at Clifton; that what constituted a reasonable time for her to remove it after it arrived, was a question of fact which should be determined by the jury, and in that connection that they might consider whether her failure to demand her baggage sooner was because of the inability or failure of the company to furnish her proper and suitable accommodations for travel, considering her state of health at the time; that the liability of the company terminated as a common carrier after her baggage arrived at Clifton, and a reasonable time had elapsed to remove it; that if she failed to remove her suitcase after a reasonable time after it arrived, the liability of the company shifted or changed from that of a common carrier to that of a warehouseman; that as a warehouseman, the company was only bound to use that degree of care and attention which a man of ordinary prudence and diligence would use in reference to the goods, under the circumstances, if they were his own, and if the company used such reasonable diligence in storing and caring for the goods, it would not be liable in case of loss by burglary; that as a warehouseman, it was its duty to store the baggage in a room reasonably safe and secure, used for that purpose; that where a railroad company places uncalled for baggage in its store-room where it is its custom to place uncalled for baggage, and such room appears to be reasonably secure for its safe keeping, the railroad company will not be liable unless guilty of negligence which caused the loss, and if they found for plaintiff, the measure of damages would be the value,

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for use by the plaintiff, of the property lost, at the time and place of its loss, together with legal interest thereon from that date, all damages having been waived except those coming within the above rule.

2. The undisputed testimony shows: August 14, 1911, plaintiff at the Denver Union Depot, checked her suitcase to Clifton, where it arrived August 15th, at 1:45 P. M.; it was uncalled for on its arrival, and the agent placed it in the baggage room of the depot; during the night of August 16th, the depot was burglarized and the suitcase, with other articles, stolen; August 17th, plaintiff arrived at Clifton at 1:10 P. M., and called for the baggage, which the company failed to deliver, because it had been stolen; that the station was a substantial building, and no negligence was shown in caring for the baggage, which occasioned its loss. Plaintiff tried the case upon the theory of the company's liability as a common carrier and insurer. The theory of the defendant was that its liability as a common carrier terminated long before plaintiff called for the baggage, and had changed or shifted to that of a bailee or warehouseman before the property was stolen, and that it was only liable as a warehouseman upon proof of negligence which caused the loss.

3. Plaintiff's railroad fare covered transportation for herself and baggage to Clifton, and ordinarily it is presumed that baggage and passenger will go by the same train, and that the baggage will be called for within a reasonable time after the arrival at its destination.—*Marshall v. P., O. & R. R. Co.*, 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650; *Blumenthal v. R. R. Co.*, 79 Me. 550, 11 Atl. 605; *Wilson v. G. T. Ry.*, 56 Me. 60, 96 Am. Dec. 435.

4. While the company had charge of the baggage as a common carrier, it was an insurer of the property

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and must pay for its value if it failed to deliver it while held in this capacity. It was the duty of the company to have the baggage ready for delivery within a reasonable time after it reached its destination, and it was the duty of the plaintiff to take it away within a reasonable time. If the baggage remained uncalled for, it was the duty of the defendant to store it in the baggage room at the station or in some other suitable place, and if plaintiff failed to take it away within a reasonable time after its arrival, the liability of the company as a common carrier and insurer changed or shifted to that of a bailee or warehouseman: It then held the property in storage; its liability as an insurer or common carrier no longer existed, and in case of its loss, plaintiff could only recover against the company as a warehouseman, upon proof that its negligence caused the loss.—4 Elliott on Railroads, (2nd ed.) § 1659; 3 Hutchinson on Carriers, (3rd ed.) §§ 1285 et seq.; 2 Redfield on Railroads, § 171; 6 Cyc. 672.

5. A reasonable time means sufficient time within reason to remove baggage after it, not the passenger, arrives. Where the facts are not disputed, what constitutes a reasonable time for a passenger to remove his baggage after arriving at its destination, is a question of law which the court must determine.—*D. & R. G. Co. v. Peterson,* 30 Colo. 77-87, 69 Pac. 578, 97 Am. St. Rep. 76; *Chicago Ry. Co. v. Boyce,* 73 Ill. 510, 24 Am. Rep. 268; *Schnitzmeyer v. Ill. C. R. R. Co.,* 147 Ill. App. 101; *K. C. Co. v. Patten,* 3 Kan. App. 338, 45 Pac. 108; *Louisville Co. v. Mahan,* 8 Bush (71 Ky.) 184; *Graves v. Fitchburg Co.,* 29 App. Div. 591, 51 N. Y. Supp. 636; *Ouimit v. Henshaw,* 35 Vt. 605, 84 Am. Dec. 646; *Chicago Co. v. Addizoat,* 17 Ill. App. 632; *Galveston Co. v. Smith,* 81 Tex. 479, 17 S. W. 133; *Kahn v. Ry. Co.,* 115 N. C. 638, 20 S. E. 169; *Ditman Co. v. K. & W. Ry. Co.,* 91 Iowa, 416, 59 N. W. 257, 51 Am. St. Rep. 352.

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6. The court left the jury to determine from all the admitted facts and circumstances, whether plaintiff called for her baggage within a reasonable time, and whether the liability of the company had shifted from that of a common carrier to that of a warehouseman. This was error. Plaintiff's baggage arrived at 1:45 P. M., on the 15th and remained in the baggage room until the night of the 16th without being called for, and it was the duty of the court to have held as a matter of law, that the baggage was not demanded within a reasonable time after it arrived.

Plaintiff could not recover against the company as a common carrier or insurer of the baggage as a matter of law. She did not demand or take it away within a reasonable time after it arrived, and she could not recover against the warehouseman, because there was no proof of negligence.

7. Plaintiff attempted to show, as a special circumstance excusing her from removing the baggage on the afternoon of the day it arrived; that she endeavored to, but could not get a sleeper until the night of the 16th, and did not feel able to travel without one. In this way she sought to extend the reasonable time to remove the baggage after it arrived at Clifton. If plaintiff had used ordinary care, thoughfuless and prudence, it must have occurred to her that if she waited until a few minutes before train time, she might have difficulty at that season of the year in securing a berth. Without making any inquiry or knowing whether or not she could procure a berth, she first went to the baggage room and checked her suitcase, expecting and intending to take the same train upon which it would go. Learning upon inquiry that she could not get a berth, she decided not to take that train, but to wait until she could secure sleeper accommodations. She allowed her baggage to go on, and

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it reached its destination two days in advance of her arrival, when she could easily have checked it for the train on which she was to travel. Under such circumstances, all the company could do was to store it in its baggage room on its arrival. There was no delinquency on the part of the company in transporting either plaintiff or her baggage which would excuse her for not calling for and removing it without delay upon its arrival, or which would extend the reasonable time for its removal after it arrived. It was the fault of the passenger that the baggage was not called for and delivered upon its arrival.

By motion for a non-suit; by requested instructions; by a request for a directed verdict; and by motion for a new trial, the court was given ample opportunity to have disposed of the case according to law. It not having done so, the judgment is reversed, and the cause remanded with directions to dismiss the action.

Reversed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

[No. 8023.]

CENTRAL TRUST COMPANY v. CULVER.

1. APPEAL AND ERROR—*Finding on Conflicting Evidence*, where there is sufficient to support it is conclusive. (335)

2. ——*Error to Court of Appeals.* The Supreme Court is restricted by Rule 50 to the consideration of questions which, in the Court of Appeals, are presented and considered on petition for rehearing.

The rule applies to both parties. (336)

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Error to the Court of Appeals.

Mr. HUGH MCLEAN, for plaintiff in error.

Mr. JOHN A. RUSH, for defendant in error.

Per Curiam: (*En Banc.*)

Cary Culver brought an action against plaintiff in error to restrain the latter from diverting water from the Little Thompson for the purpose of irrigation. The only issue involved, so far as necessary to consider, was whether the rights awarded the priority under which defendant claimed, had been abandoned. Trial was to the court, and upon conflicting testimony this issue was determined in favor of plaintiff. Defendant appealed to the Supreme Court, where the judgment was reversed, and the cause remanded for a new trial upon the ground that material, competent, testimony offered on behalf of defendant had been excluded.—*Central Trust Co. v. Culver,* 35 Colo. 93, 83 Pac. 1064. Prior to the second trial Culver died, and his widow was substituted as plaintiff. A retrial of the cause again resulted in a judgment in favor of plaintiff, from which defendant appealed to this court. The cause was transferred to the Court of Appeals, where the judgment was affirmed.—*Central Trust Co. v. Culver,* 23 Colo. App. 317, 129 Pac. 253. The defendant brings the case here for review on error.

So far as material the issue at the second trial was the same as at the first, namely, abandonment, which was found in favor of plaintiff. The Court of Appeals refused to disturb the finding of fact on this issue, because it was based on conflicting evidence. This ruling was correct, because it appears there is sufficient testi-

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mony to support the finding of the trial court on the subject of abandonment.

Counsel for defendant, however, urge that the Court of Appeals erred in sustaining the trial court in the reception of testimony, and in holding that plaintiff was not estopped or precluded from maintaining the action. From the facts narrated in the opinion of the Court of Appeals, and as disclosed by the record, we think the ruling of the Court of Appeals on these questions was correct.

The further point is made that the Court of Appeals overlooked another question upon which defendant relied for reversal of the judgment. From the opinion it appears that the Court of Appeals did not consider this question. It was called to the attention of the court by a petition for rehearing, but in our opinion the proposition is not applicable to the case.

Plaintiff has also filed cross-errors which were not passed upon by the Court of Appeals, although filed in that court. The record fails to disclose that plaintiff sought to have the questions thereby raised considered by a petition for rehearing. Rule 50 provides that the errors assigned to the judgment of the Court of Appeals shall be limited to those raised by such petition, which must be filed and considered before the party seeking a review of the judgment by the Supreme Court will be heard. This rule applies to both plaintiff and defendant in error.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Decision *en banc.*

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[No. 8112.]

CORT-HAMES MERCANTILE COMPANY v. HANLON.

JUSTICE OF THE PEACE—*Jurisdiction.* A justice of the peace may entertain jurisdiction of an action upon a promissory note specifically payable at a place within his precinct, though defendant resides in a different precinct.

Error to Elbert County Court.—Hon. FRANK S. TURNER, Judge.

Mr. B. C. HILLIARD, Mr. T. M. JONES, Mr. J. R. ALIPIN, for plaintiff in error.

No appearance for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

This review relates to a judgment of the County Court dismissing a suit that had been appealed from a justice of the peace. It was dismissed because it had not been commenced in the precinct where the defendant resided. Only one of the reasons urged in the brief why the court erred in dismissing the suit need be noticed.

At the hearing, on the motion for dismissal, it was made to appear, by stipulation, that the suit was brought on a promissory note specifically made payable at Elizabeth, Colorado, and that Elizabeth was in the justice precinct in which the suit was commenced.

The suit was properly commenced in the justice precinct where the note sued on was specifically made payable. § 3719, R. S. 1908. The judgment is reversed and the cause remanded with directions to proceed with the trial.

Reversed and remanded.

MR. JUSTICE GABBERT and MR. JUSTICE HILL concur.

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[No. 8120.]

BIVENS V. HULL ET AL.

1. SPECIFIC PERFORMANCE—*Contract of Stockholders in Corporation for Increase of Stock.* Two directors of a corporation, owning the majority of the stock outstanding, agreed with a broker that its stock should be increased, that a proportion of the increase should be awarded to one of the directors, without anything to be paid therefor, and another proportion should be awarded to the broker in consideration of his procuring the sale of other shares, so as to produce a specified sum. Bill by the broker against the contracting directors, for specific performance. *Held* that inasmuch as to specifically enforce the contract would involve the coercion of the corporation to do what it had never agreed to do, and might be unwilling to do the relief must be denied. (341, 342)

2. PARTIES—*Necessary Defendants.* A contract of directors of a corporation contemplating and requiring a corporate action cannot be enforced in an action to which the corporation is not party. (343)

3. CORPORATIONS—*Treasury Stock.* Stock held by a corporation for sale, unsubscribed, is not treasury stock. (342)

4. ——*Issue of Stock for Services,* if authorized by the Constitution and statutes, is permitted only where the services rendered are equal in value to the stock. (343)

5. CONTRACT—*Illegal.* A contract by stockholders of a corporation, who are also directors, with a broker, that the stock of the corporation shall be increased, that one of the directors shall receive a portion of the increase without paying therefor, and that for certain services to be rendered by the broker he shall receive an excessive reward in stock is vicious. (342)

6. INJUNCTION—*Preliminary—Emergency.* Two judges of the district court had passed upon the alleged emergency upon which a preliminary injunction was awarded. On appeal the court declined to review their action. (344)

Error to Routt District Court.—Hon. JOHN T. SHUMATE, Judge.

Mr. JOHN H. GABRIEL, Mr. J. K. BOZARD, for plaintiff in error.

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Mr. WELLS B. MCCLELLAND, Mr. C. R. MONSON, for defendants in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

The action below was for the specific performance of a contract and an injunction. A general demurrer to the amended complaint was sustained and the action dismissed. The amended complaint alleged that the plaintiff in error, who was plaintiff below, entered into a contract with the defendants in error, who were defendants below, wherein it was recited that the defendants were the owners of a majority of the stock of the Hull Telephone Improvement Company; that they desired Bivens, the plaintiff, to raise money to finance the company, and that Bivens had agreed to raise at least $5,000 by sale of treasury stock, at not less than fifteen cents a share; that in consideration of this promise the defendants agreed,—as stated in the words of the contract,—"to cause a meeting of the stockholders of said company to be called and held for the purpose of increasing the capital stock of said company from the sum of $50,000 to the sum of $250,000, and increase the directors of said company from three to seven; and further agreed that the capital stock of said company shall be held as follows: 140,000 shares as treasury stock, and the balance, 110,000 shares, promotion stock, of which 110,000 shares 30,000 is outstanding, and the balance to be distributed as follows: 50,000 shares to C. E. Bivens on his fulfilling his part of this agreement, the other 30,000 shares to Horace Hull and his associates. In consideration of which the said C. E. Bivens agrees to raise the sum of at least $5,000 to finance said company, by selling treasury stock of said company for not less than 15 cents a share, on the sale of which and

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delivery of the sum of $5,000 to said company, said C. E. Bivens is to receive 50,000 shares of said promotion stock, and the other 30,000 shares of promotion stock to be delivered to said Horace Hull and his associates."

The amended complaint further alleges that at the time of the execution of the contract the capital stock of the company was $50,000, divided into shares of the par value of one dollar each; that of this, 30,000 shares were issued and outstanding, of which the defendants owned 22,500 shares and had a proxy for 5,000 shares more; that defendants were two of the three directors of the corporation; that pursuant to the contract a meeting of the stockholders was called and held for the purpose of increasing the capital stock from $50,000 to $250,000, and to increase the number of directors from three to seven; that at the meeting the defendants voted all the stock owned and controlled by them as aforesaid against the increase of the capital stock, and advised all the other stockholders to vote against it, so that such proposed increase was defeated; that at that stockholders' meeting, the defendants voted to increase the number of directors from three to seven, and the increase of directors was made; that the plaintiff, relying upon the said contract and in full confidence that the defendants would at the stockholders' meeting vote to increase the capital stock, proceeded to raise the sum of $5,000 as provided in the contract, and entered into a contract of sale and sold to certain parties 33,333 shares of the capital stock of the company at fifteen cents a share, for the full sum of $5,000; that this stock so sold was the stock provided by the contract with the defendants to be sold; that the purchasers of the said stock have demanded the same of the plaintiff, and threaten to bring suit against him to compel its delivery; that before the commencement of the action plaintiff tendered to the defendant for the

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company the $5,000 named in the contract to be raised, and demanded that the defendants carry out that contract and cause to be issued to the purchasers the 33,333 shares of the capital stock of the company and that the defendants failed and refused to do this. Then follow further allegations on matters, the existing of which were necessary to compel a specific performance of a contract for the sale of stock, and also matters necessary to obtain an injunction. The prayer was for a temporary injunction restraining the defendants from transferring any of the stock which they held, and that upon a final hearing the defendants be ordered to specifically perform the contract and to cause a meeting of the stockholders to be held to increase the capital stock as provided therein, and upon the holding of the stockholders' meeting the defendants be ordered to do everything necessary to increase the capital stock, and upon the increase to issue to the plaintiff 50,000 shares of the stock, and to issue to the purchasers the stock which the plaintiff sold to them.

The defendants insist that all they contracted to do was to cause a stockholders' meeting to be called and held for certain purposes; that such meeting was called and held, and therefore the defendants fulfilled their contract. Be this as it may, there are various reasons why a court of equity should give no further countenance to the contract, among which the following are sufficient: The original issue and disposition of its capital stock are acts to be performed by a corporation. It was proposed in the contract to issue and dispose of stock that was not, and could not become, the property of either plaintiff or defendants, until it was issued and disposed of by the corporation in the manner provided by law. In order to give the relief sought for by plaintiff it would be necessary to coerce the corporation not only to in-

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crease its capital stock, but to issue and dispose of it in accordance with a contract with which it had nothing to do, and in an action to which it was not a party. Furthermore, the unissued capital stock of a corporation belongs to it. It forms its capital at its par value and the corporation, only, has the right to dispose of it, and that in accordance with law. This contract proposed to dispose of the capital stock of the corporation. $140,000 worth of it was to be treasury stock. Treasury stock has a meaning different from what was meant thereby in this contract. It is evident that what was termed treasury stock in the contract was stock to be held by the corporation as unsubscribed for and unissued. Bivens was to sell enough of this so-called treasury stock at fifteen cents a share to produce $5,000. It is plain that this stock to be sold by Bivens was to be carved out of the original issue and the corporation was to originally issue and part with $33,333 worth for $5,000. That is all it was ever to have, or could expect to obtain, and that is what the plaintiff wants a court of equity to say that the corporation shall take for it, whether it wants to or not, because three individuals have contracted that it shall do so. $110,000 worth of the stock was to be promotion stock, whatever that may be. Of this, $30,000 worth was already issued and outstanding, and the remaining $80,000 worth was to form a melon, which was to be cut up so that Hull and his associates were to get $30,000 worth and Bivens $50,000 worth.

So far as it appears from the contract, the corporation was to receive nothing whatever for the 30,000 shares of stock that was to go to Hull and his associates. There is no law to warrant any such disposition of the capital stock of a corporation. $50,000 worth of the stock was to go to Bivens. It may be urged here that the services of Bivens in selling stock so that the corpo-

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ration would get $5,000 would be a consideration for the issuance of the $50,000 worth to Bivens. It may be true that our constitution and statutes authorize the issuance of stock for services rendered to a corporation. If that is so, it is coupled with the idea that the services rendered shall be of the value of the stock issued therefor. It is also true in this connection that the authorities, when good faith is present, give to the value of the property or services for which stock is issued an elastic quality, but there is no authority that stretches such value to the extent of authorizing the payment of $50,000 of the original capital stock for services rendered in procuring $5,000 in money for the corporation. By this contract, then, this corporation was to part with $113,000 worth of its capital stock, and all that it was to receive therefor was $5,000. The value of $5,000 is fixed. There is no prospect of its ever being worth any more. Its purchasing power may increase or diminish, but its value always remains at $5,000. Without intimating that such a contract, if made by a corporation, would be enforceable, because that question is not now before us, it is certain that the corporation cannot be made to perform such a contract when it did not make it, in a suit to which it is not a party.

The defendants in error have assigned cross-error. A temporary restraining order was issued without notice, pending the application for a temporary injunction, restraining the defendants from transferring stock held by them. At the hearing, a temporary injunction was denied, and a demurrer was sustained to the complaint and the suit dismissed. The defendants claim that the court erred in not entering judgment on the emergency bond given when the temporary restraining order was granted. The matter of the emergency that existed for the issuance of the temporary restraining order seems

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to have been passed upon by two district judges adversely to the contention of defendants in error. Under such circumstances, we do not feel justified in interfering with their disposition of the matter, but will leave the parties with their unwarranted contract where the District Court left them.

The judgment is affirmed.

Judgment affirmed.

MR. JUSTICE GABBERT and MR. JUSTICE HILL concur.

[No. 8188.]

GENERAL FILM COMPANY v. MCAFEE, SHERIFF.

SHERIFF—*Process Where He is a Party Must be Served by Coroner.* Rev. Stat. Sec. 1298 is mandatory. Where the sheriff is party to an action all process therein must be served by the coroner. A special panel of jurors summoned by the sheriff in such case, must be discharged on motion.

Error to Weld County Court.—Hon. HERBERT M. BAKER, Judge.

MESSRS. DANA & BLOUNT, MESSRS. MANN & MANN, for plaintiff in error.

MR. JUSTICE BAILEY delivered the opinion of the court:

On May 10, 1912, the General Film Company brought suit in a Justice's Court of Weld County against S. J. McAfee, as Sheriff, and recovered judgment for possession of certain personal property, which the latter

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held in his custody under a levy of an execution theretofore issued to him upon a judgment entered in a court of record in an action between other parties.

The defendants appealed the case to the County Court. Plaintiff moved in that court to dismiss a special panel of jurors which had been theretofore summoned by the defendant, as Sheriff, to try the cause, and also moved that a special venire issue, directed to the Coroner of the county to summon jurors, upon the ground, among others, that the Sheriff was a party to the action. This motion was overruled, whereupon plaintiff declined to appear further. Defendant moved for judgment, which, after evidence as to the value of the property, was rendered in his favor. Plaintiff brings that judgment here for review.

Whether it was error for the court to refuse to dismiss the panel of jurors which the defendant, as Sheriff, had summoned, and direct a special venire to the Coroner, pursuant to the motion of the plaintiff, is the sole question to be determined. Section 1298, R. S. 1908, reads as follows:

"Every coroner shall serve and execute process of every kind and perform all other duties of the sheriff when the sheriff shall be a party to the case, * * * and in all such cases he shall exercise the powers and proceed in the same manner as prescribed for the sheriff, in the performance of similar duties."

The Sheriff was the defendant in the action. The statute provides, in clear terms, that in such case the Coroner shall execute process of every kind and perform all other duties of the Sheriff. The statute is mandatory, and when the court's attention was directed to the fact that the Sheriff was the defendant, it should have dismissed the special venire and issued a new one, di-

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rected to the Coroner to summon a jury to try the case, as by statute expressly provided.

The judgment is reversed and the cause remanded, with directions to try the question of title to the property in dispute according to law, and in conformity with the views herein expressed.

Reversed and remanded.

Decision *en banc.*

[No. 7748.]

BENSON v. DENVER CITY TRAMWAY COMPANY.

Action for Negligence. Plaintiff having produced evidence sufficient in the opinion of the court to require submission to the jury, a judgment of non-suit ordered on motion of defendant was reversed.

Error to Denver District Court.—Hon. GEO. W. ALLEN, Judge.

Mr. GEORGE K. ANDRUS, for plaintiff in error.

Mr. GERALD HUGHES, and Mr. HOWARD S. ROBERTSON, for defendant in error, Mr. FREDERICK P. SMITH, of counsel.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Plaintiff in error brought a suit for damages against defendant in error, to recover for personal injuries, claimed to have been caused by the negligence of the latter. The cause came on for trial before a jury, and at the close of her case, the defendant moved for a non-suit, on the ground that she failed to show that her injury was due to the negligence of the defendant. This motion was sustained.

We are of the opinion that the testimony on behalf of plaintiff was sufficient to require the court to submit to the jury, for their determination, whether her injury was caused by the negligence of The Tramway Company. The judgment of the District Court is reversed, and the cause remanded for a new trial.

Judgment reversed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 7776.]

METY, ADMINISTRATOR, v. WRIGHT.

Judgment clearly supported by the evidence as unquestionably just. Affirmed.

Error to Denver District Court.—Hon. HUBERT L. SHATTUCK, Judge.

Mr. S. D. CRUMP, and Mr. H. C. ALLEN, for plaintiff in error.

Mr. C. H. WINGENDER, and Messrs. DOUD & FOWLER, for defendant in error.

Per Curiam.

Action by defendant in error against Stanley E. Wilmot to rescind a contract and recover money claimed to have been obtained by fraud and misrepresentation. Verdict and judgment for plaintiff.

The testimony clearly establishes the fraud charged; the judgment entered on the verdict is unquestionably just, and as none of the points urged by plaintiff in error justify this court in disturbing it on review, it is affirmed.

Judgment affirmed.

Decision *en banc.*

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[No. 7743]

SHULL v. SHULL.

Error to Logan County Court.—Hon. JNO. W. LANDRUM, Judge.

Mr. QUITMAN BROWN, for plaintiff in error.

Messrs. MCCONLEY and HINKLEY, for defendant in error.

Per Curiam: (Department No. 1.)

In the absence of a duly authenticated and properly certified bill of exceptions, the questions raised by plaintiff in error cannot be considered. The judgment of the County Court is affirmed.

Judgment affirmed.

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[No. 8046]

FRANK E. KENDRICK, COUNTY TREASURER, v. TWIN LAKES RESERVOIR COMPANY.

Error to Lake District Court.—Hon. JAMES OWEN, Judge.

Mr. JOSEPH W. CLARKE, for plaintiff in error.

Mr. W. L. HARTMAN, Mr. C. A. BALLREICH and Mr. CHAS. W. O'DONNELL, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

This case presents the identical question decided in No. 8045, entitled *Frank E. Kendrick, as County Treasurer of Lake County v. The Twin Lakes Reservoir Company.* For the reasons stated in that opinion, the judgment of the lower court is affirmed.

Affirmed.

Decision *en banc.*

Mr. JUSTICE WHITE not participating.

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[No. 8037]

MORGAN v. SHAW.

Error to San Juan County Court.—Hon. WILLIAM PALMQUIST, Judge.

Mr. FRANK L. ROSS, for plaintiff in error.

Per Curiam.

This action was instituted before a Justice of the Peace in San Juan county, and there were no pleadings. It was for balance on account of $59.50. The defendant below, defendant in error here, claimed an off-set. Judgment before the Justice of the Peace was for one dollar and costs in favor of the defendant.

The plaintiff appealed to the county court where the cause was tried before a jury and verdict rendered in favor of the defendant for precisely the same amount. The finding for one dollar was remitted by the defendant, and judgment rendered against the plaintiff in error for costs.

An examination of the record discloses no substantial error in the proceedings.

The judgment is affirmed.

Department two.

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[No. 8015]

HEGINBOTHAM v. WEBSTER ET AL.

Error to the Court of Appeals.

Messrs. MUNSON and MUNSON, for plaintiff in error.

Messrs. ALLEN and WEBSTER, for defendants in error.

Per Curiam.

We have thoroughly examined the record, briefs and opinion of the Court of Appeals in this cause,* and after full and careful consideration are of opinion that the conclusion reached by that court is correct. Its judgment is therefore affirmed.

Judgment affirmed.

Decision en banc.

*23 Col. Ap. 229, 129 Pac. 569.

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JANUARY TERM

[No. 7910]

COLORADO SPRINGS AND INTERURBAN RAILWAY COMPANY v. ENGLE.

1. STREET RAILWAY COMPANY. *Care Required in Operation of Cars.* One operating a street car, seeing a pedestrian near the track, but not in a position of peril, and not under circumstances warranting the apprehension on the part of a reasonably prudent person that she will presently be in peril, is not under duty to stop his car, even though there is time. (356, 357)

2. INSTRUCTIONS. *Erroneous—Presumption.* No presumption will be indulged that the jury evolved a correct rule from an erroneous instruction. (356)

3. ——*Construed.* Action for an injury attributed to negligence in the operation of a street car. The jury were told by one instruction that if the motor-man failed to stop his car, after, by reasonable care, he could have discovered plaintiff "near or upon the track." Another point of the charge declared it to be the duty of one about to cross the tracks of a street railway, to exercise such care as a reasonably prudent person would, under like conditions. Still another instruction recited conditions under which the plaintiff must fail, referring to plaintiff, when she "stepped upon the track in front of" the car, or "was about to do so." *Held* that the latter instructions had not the effect to impose upon the phrase "near or upon the track," in the first, the sense of "dangerously near, or in a position of peril." Hill and Teller, JJ., dissented. (359)

Error to El Paso District Court.—Hon. JAMES OWEN, Judge.

Messrs. CHINN & STRICKLER, for plaintiff in error.

Messrs. ORR, ROBINET & MASON, for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

The Colorado Springs and Interurban Railway Company, a corporation, owns and operates an electric

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railway system upon certain public thoroughfares, including Pike's Peak Avenue and Tejon street, in the City of Colorado Springs. Upon Pike's Peak Avenue it has single tracks extending east and west in the center of the street, used only by westbound cars, and which, at the intersection of the aforesaid thoroughfares, cross double tracks on Tejon street. January 19, 1912, at about 1:30 P. M., Nellie B. Engle, while going north along the west side of Tejon street across Pike's Peak Avenue was struck by a sprinkler, or water car, of the railway company traveling west upon the Pike's Peak Avenue tracks, and sustained certain personal injuries for which she brought an action against the company to recover damages. The complaint alleges that her injuries were caused primarily and proximately by the negligence and carelessness of the railway company in failing to lessen the speed of the car, and give warning to her of the approach thereof, as she was about to cross the track upon which the car was traveling; and that the motorman in charge of the car "saw, or by the exercise of ordinary care should have seen, the plaintiff while proceeding to cross said street and track in time to have prevented the injury which she sustained." The defendant railway company denied any negligence whatever upon its part, and alleged contributory negligence upon the part of the plaintiff. The verdict and judgment were in favor of the plaintiff and the defendant brings the cause here for review.

The evidence shows that the intersection of the street was level and, as to permanent physical obstructions, the entire space clearly visible from any point over which plaintiff was traveling; that the wind was blowing, and the air was cloudy with dust, which to some extent interfered with seeing objects upon the street; that at the time of the accident plaintiff was twenty-four years

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of age, and had lived in Colorado Springs for five years immediately preceding the accident and was perfectly familiar with the condition of the streets, the tracks in question, and the operation of the cars thereon; that her sense of sight and hearing were unimpaired, and that she had traveled in each direction on the streets in question, almost daily during her residence in the city; that just before the accident she was walking in a northerly direction, on the west side of Tejon street, across Pike's Peak Avenue; that when she reached a point about fifty-five feet south of the car tracks on Pike's Peak Avenue she stopped, looked east and saw a car on those tracks at the east side of Tejon street, which is about 100 feet in width; that plaintiff thereupon continued her course north until she was within two to five feet of the Pike's Peak Avenue car tracks, when she again stopped; that at this time, the water car was moving westward towards her, and was within ten or twelve feet of her: After so stopping, and while the car was so continuing in its course, she stepped upon the tracks in front of the car, was almost instantly knocked down by it, and sustained the injuries on which she bases her right to recover herein. Upon this point the plaintiff herself testified that she stopped "within four or five feet" immediately south of the Pike's Peak Avenue car tracks, "adjusted" her hat, and "carefully" looked east in the direction from which cars might be coming on that track, listened, but neither saw nor heard a car, and thereupon started across the tracks, and when she was in the middle thereof was struck by the car. The record fails to show any ordinance requiring the sounding of gongs at crossings, or regulating the rate of speed at which cars should travel on the tracks in question.

There was evidence on behalf of the plaintiff that immediately preceding the accident the motorman in

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charge of the car was looking north, that is, in a different direction than the car was traveling, and there was no bell sounded; that the motorman had stated immediately after the accident that he had not seen plaintiff, and did not know how the collision had occurred. The motorman testified that he was looking in the direction in which the car was going, saw the plaintiff approaching the track, and sounded the gong; that plaintiff thereupon stopped, but did not turn her head either way; that she started forward, whereupon he did his utmost to stop the car. The car had a force of two men, one of whom handled the water lever whereby the sprinkling was done, while the motorman had exclusive charge of operating the car. Both men were in the front vestibule at the time of the accident and the man in charge of the water was on the north side looking north, as the car crossed Tejon street.

By Instruction No. 4, the jury was told that:

"If you find and believe from a preponderance of all the evidence in the case that the plaintiff Nellie B. Engle, was run over and injured by said sprinkler car on the defendant's street car track at the intersection of Pike's Peak Avenue and Tejon Street at the time alleged and you further find that plaintiff, while exercising reasonable care for her own safety, was crossing or apparently attempting to cross said track, and that the defendant's motorman in charge of said car failed at said time to use reasonable care and caution to discover plaintiff upon or about to cross said track or that he negligently failed to stop said car in time to avoid injuring the plaintiff after having discovered, or by the exercise of reasonable care could have discovered her near or upon the track, and in time to have stopped said car before striking plaintiff, by the exercise of reasonable care in using the appliance at his command for stop-

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ping said car, you will find the issues herein joined for the plaintiff."

It is claimed that this instruction is erroneous in many respects. Without expressing an opinion as to its other provisions, or as to the correctness of other instructions given or refused by the court of which complaint is made, we are certain that in directing the jury that the defendant was liable to plaintiff if the motorman in charge of the water car failed to stop the car after having discovered, or by the exercise of reasonable care, could have discovered, plaintiff "*near* or upon the track," and in time to have stopped the car before striking her, necessitates a reversal of the judgment.

According to all the evidence, when plaintiff was "near the track," that is, from three to five feet south thereof, she was standing still. Some of her witnesses stated that she was adjusting her hat and clothing, disarranged by the force of the wind. According to her own testimony she not only stopped within four or five feet immediately south of the track, but also carefully listened, and looked in the direction from which the car was coming. Had the motorman seen the plaintiff "near" the track, under the circumstances and conditions detailed in evidence by herself and her witnesses, it would not follow that he had reason therefrom to believe that she was in a position of peril or would presently so be. To step "upon or near" the track *under circumstances and conditions that would cause a reasonably prudent man to believe that plaintiff was in a position of peril* is quite a different matter than being only "near or upon the track." The language of the instruction clearly sets out an erroneous principle of law and there can be no presumption that the jury evolved a correct principle therefrom. It directs the jury to return a verdict against the defendant if they believed that the

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motorman in charge of the car saw or by the exercise of ordinary care could have seen, the plaintiff "near or upon" the car tracks in time to stop the car before injuring her, even though at such time the plaintiff was not in a position of peril and the motorman as a reasonably prudent man, had no cause to believe that she would presently be in such position. This is not the law. A defendant should not be held liable for the failure of its servant to look, when, if he had looked and seen all the circumstances and conditions existing, no duty to a plaintiff to act otherwise than he did, could have arisen.

We have heretofore, in *Chicago Company v. Church*, 49 Colo. 582, 590, 114 Pac. 299, condemned an instruction because of the very vice embodied in the one now under consideration. While in that case the injury of which complaint was made was for the death of cattle killed at a public road crossing by a railroad train, the principle of law involved was the same as we are now considering. We there said:

"The court instructed the jury that if they believed from the evidence 'that the persons in charge of the engine and train of cars in question, by ordinary care, skill and prudence, could have seen the animals, or that they did see them in season, so that by the use of ordinary care and skill, and without danger to the train, they might have stopped the train before striking the animals and thus avoided the injury, and did not do so, this would be such negligence as would render the defendant liable for the injury and damage sustained,' unless plaintiff's own fault contributed to the injury. Under the circumstances of this case, we think the instruction erroneous. It, in effect, declares that if the employes in charge of the train did see, or in the exercise of ordinary diligence, could have seen the animals, regardless of where they were, so that by ordinary care the train

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might have been stopped before striking the animals, the defendant was liable. We do not think the defendant was required to stop or slacken the speed of its train, until its servants saw, or, by the exercise of reasonable care, could have seen the cattle in a position of danger or, at least, in such close proximity to danger as to cause a reasonably prudent person to believe that they were likely to be injured unless proper effort was put forth to avoid it. 'Under this instruction the jury might well have felt authorized to find the requisite negligence, if the servants say the cow anywhere *near* the track, and failed to stop or check up the train, regardless of any indication of a movement on her part to approach the track.'"

So, in the case at bar, the defendant was not required to stop or slacken the speed of the car merely because the plaintiff was near or even upon its tracks. Actual or constructive notice on the part of the motorman, of peril or impending danger to the plaintiff was a condition precedent to action in that respect. This principle is discussed and applied in *Kent v. Treworgy,* 22 Colo. App. 441, 444, 125 Pac. 128, 129, in the following language:

"Again, these instructions, as we view them, are fatally defective from yet another point of view. They advise the jury, in effect, that if the defendant could have stopped or checked his machine *at any time after first seeing the approach of the plaintiff on his bicycle,* then he was guilty of negligence *per se* if he, the defendant, failed to stop the machine. * * * If the testimony offered by plaintiff, especially that of the driver of the sand wagon, be accepted, then the defendant did see, or could readily have seen, the boys approaching on their wheel for some time before the accident, and before they were in any peril whatever. These instructions,

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especially No. 6, advise the jury that it was the duty of the defendant to stop as soon as he had seen the boys approaching on the wheel, wholly regardless of whether they were or were not, at the time he first saw them in a perilous position."

It is claimed, however, that the words "near or upon" as used in the instruction, in connection with all the instructions given, could have no other meaning than "dangerously near, or in a position of peril." We are unable to give our assent to this contention. Instruction No. 7 defines the duty of a pedestrian, about to attempt to cross tracks of a street railway company, to look out for himself and exercise such ordinary care as would be exercised by a reasonably prudent person under like conditions, and with No. 8 makes a concrete application of that doctrine to the facts of this case. The conditions therein recited, under which it is stated that plaintiff could not maintain her cause of action, refer to her when she "stepped upon the car tracks in front of" the car, or when "plaintiff was about to place herself in a position of danger by stepping on said tracks." But Instruction No. 4, in attempting to make a concrete application of the rule as to the duty of the defendant, declares, substantially, that defendant must respond in damages if the motorman failed to stop his car in time to avoid injuring the plaintiff, if he saw, or by the exercise of reasonable care could have discovered her "near or upon the track" in time to have stopped the car before striking her. When considered together, we have the declaration as found in Instructions Nos. 7 and 8 that plaintiff can not recover if the jury finds certain conditions and facts existed "when she stepped upon the car track in front of" the car or was "about to place herself in a position of danger by stepping on said tracks;" and by Instruction No. 4 that defendant should

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be held liable if they find that certain conditions and facts existed when the plaintiff was either "near or upon" the track without reference to the danger or peril if any, to which she was thereby subjected. Instructions of such character, even though some declare correct principles of law, are clearly misleading and furnish no correct guide to the jury, and the giving thereof constitutes error.

The opinion heretofore rendered herein by a Department of this Court is, therefore, withdrawn, the judgment reversed and the cause remanded.

Judgment reversed.

Decision *en banc.*

Mr. JUSTICE HILL and Mr. JUSTICE TELLER dissent.

Mr. JUSTICE HILL dissenting:

When considered in connection with the other instructions and applied to the evidence, I cannot agree that the giving of Instruction No. 4 was prejudicial error. It left the question of the negligence of the defendant, when applied to the particular facts of this case, to the jury. This is the rule heretofore approved by this court.—*R. G. W. Co. v. Boyd,* 44 Colo. 119, 96 Pac. 781.

Neither can I altogether agree with the reasoning wherein the opinion states. "Had the motorman seen the plaintiff 'near' the track, under the circumstances and conditions detailed in evidence by herself and her witnesses, it would not follow that he had reason therefrom to believe that she was in a position of peril or would presently so be." That would depend entirely upon the circumstances; such might or might not be the case, and was a question for the jury to determine. The

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motorman was protected from the storm by a glass front in the vestibule, and according to the testimony of numerous witnesses, had he been looking in the direction the car was going, instead of looking north, he probably would have seen the plaintiff struggling with her wearing apparel in an attempt to cross the street in a severe windstorm, with the dust and sand blowing in her face, with a kind of whirlwind filled with dust at the time, which might have prevented her from seeing the car, and hence make her oblivious of her danger; for which reasons, the question of her being in a position of peril depended, to a certain extent, upon her knowledge of the approach of the car, or her ability to see it upon account of the storm, and if the jury were of the opinion, from the evidence, that these circumstances and conditions would cause a reasonably prudent man to believe that she was in a position of peril, upon account of these facts when near the track, they would be justified in thus finding, for which reason, as there used, the words "near or upon" could have no other meaning than dangerously near the tracks, that is in a dangerous position; the context thus indicates and the jury could not have understood it otherwise, especially when considered in connection with the other instructions.

In Instruction No. 6, her position is spoken of as a dangerous one. In No. 7, the jury were told.

"That it is the duty of a pedestrian about to attempt to cross the tracks * * * to look out for himself and to exercise such ordinary care as would be exercised by a reasonably prudent person under the attending circumstances. If you should find and * * * that the plaintiff, before stepping upon the car tracks of defendant, failed to exercise the care above mentioned, then you should return a verdict for the defendant."

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The words "about to cross the tracks" "before stepping upon the car tracks, etc., also "car approaching stepped upon track" and similar phrases are found throughout the instructions which clearly indicate that the word "near" as used in Instruction No. 4, was intended in connection with danger, meaning dangerously near and was certainly thus understood by the jury.

By Instruction No. 8, the jury were told:

"If you shall find * * * that the plaintiff, just before stepping upon the tracks of the defendant company, stopped and looked in the direction of the water car of the defendant, and that under the circumstances a reasonably prudent person operating said car would have had a right to believe from said acts of the plaintiff that she had seen said car approaching, and did not intend to step upon said tracks until after said car had approached the point opposite which she was standing, then the defendant company was under no obligation to slacken the speed of its said car, and that those in charge of the car had a right to permit it to continue in a westerly direction without stopping it until such time as in the exercise of ordinary care those in charge of the car should have known that the plaintiff was about to place herself in a position of danger by stepping on said tracks."

We thus see that the company's side of this question was fairly and fully submitted to the jury on the testimony; that the company's rights in this respect were fully protected by the latter part of this instruction; that if there was any uncertainty as to the proper meaning to be given that portion of Instruction No. 4 held bad, it was made certain and altogether cured by the giving of Instruction No. 8; all of which convinces me that there was no prejudicial error in the instructions.

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The case of *Chicago Company v. Church,* 49 Colo. 582, 114 Pac. 299, refers to a rule concerning livestock killed by a railroad train in the country, and I do not think is applicable to the facts here. I would hate, at least, to think that the degree of care required by a street railway company, at a busy corner, in the heart of a city, is to be measured by the same rules involving the killing of livestock by railroad trains in the country. Besides, there is no similarity in the instructions, as a reading of them will disclose. The one in the Church case says nothing about the cattle being near or upon the track, and for this reason, as the opinion says:

"It, in effect, declares that if the employees in charge of the train did see, or, in the exercise of ordinary diligence, could have seen the animals, regardless of where they were, so that by ordinary care the train might have been stopped before striking the animals, the defendant was liable." But such is not the case here. This instruction tells the jury.

"If * * * the defendant's motorman * * * by the exercise of reasonable care could have discovered her near or upon the track, and in time to have stopped said car," etc.

The word "near" is coupled with "or upon," which in the way used meant her location immediately preceding going upon the track, which is also convincing that as used it meant dangerously near and in the same position which Instruction No. 8 refers to wherein it says "just before stepping upon the tracks," and as therein used the opinion appears to concede that it makes a correct concrete application of the same doctrine to the facts of the case.

As I read it, the case of *Kent v. Treworgy,* 22 Colo. App. 441, 125 Pac. 128, is not applicable to the facts here upon account of the dissimilarity in the instruc-

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tions. In the Kent case the instructions assumed to tell the jury what constituted negligence, it was for this reason they were held bad. While in Instruction No. 4 the court avoids this and throughout has left it to the jury to determine whether the motorman was or was not negligent, and whether he did or did not use reasonable care concerning any phase of the case. It also imposed the exercise of due care upon the plaintiff, and Instruction No. 8 left it to the jury to determine whether by her actions he had reason to believe she was about to go upon the track or not; while in the Kent case no duty or liability was imposed upon the plaintiff, which made the instructions specially objectionable, as pointed out by the court.

Mr. JUSTICE TELLER concurs in the views herein expressed.

Decided April 6, A. D. 1914. Rehearing granted and judgment reversed April 5, A. D. 1915.

[No. 7495]

GIBBS ET AL. v. WALLACE ET AL.

1. CONTRACTS. *Consideration—Mutuality.* Plaintiffs being indebted to defendants in $10,759 executed a note therefor due in three years, with interest, and conveyed to defendants, as security therefor, certain lands, situate in Kansas. A contemporaneous contract provided that plaintiffs should retain possession of the lands for three years, might sell the same, paying over anything received thereon to defendants, and if they should fail to sell the lands, or should not pay the note at maturity, the title of the lands "should be and remain" in defendants, and plaintiffs should be credited on their note with the sum of $11,200. Plaintiffs having failed to pay the note demanded the credit of $11,200,

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tendering what they alleged to be the balance. *Held* that the demand, and compliance therewith, would be a consideration sufficient to vest title in defendants, and bar the equity of redemption; and that there was no lack of mutuality in what was proposed. (366, 369)

2. MORTGAGE. *Conveyance Absolute As—Contract Barring Mortgagor's Equity.* Lands were conveyed as security for indebtedness. A contemporaneous contract provided that if the indebtedness should not be paid at or before its maturity, the land should remain the property of the mortgagees, and the mortgagors should be entitled to a certain credit. *Held* that the mortgagor insisting that the creditor should accept the lands, and allow the credit, the mortgagees were not to be heard to contend that the provision for thus barring the equity of redemption was invalid; that the mortgagors insisting upon the mortgagees' acceptance of the land, according to his contract was estopped to afterwards deny their title. (368, 369)

3. CONTRACTS. *Construction.* Several instruments executed at the same time, between the same parties, and relating to the same matter, are to be construed together. (371)

4. EQUITY. *Reformation of Writings—Measure of Proof Required.* One seeking the reformation of a writing has, not only the burden of proof, but must produce evidence sufficient to rebut the strong presumption created by the writing itself. (372)

5. ACCOUNT—*Mortgagor and Mortgagee.* Lands were conveyed by deed absolute, as security, with an agreement that if the indebtedness should not be paid at or before its maturity, the mortgagee should retain the title, allowing a certain credit. The conveyance contained a covenant against incumbrances, except a certain mortgage.

The mortgagors were held entitled to a credit for interest paid by them upon the mortgage recited, which had accrued prior to the date of the conveyance; also for taxes paid upon the lands, and upon other lands included in the security; and it appearing that there was a second mortgage not mentioned in the conveyance or accompanying contract, they were held entitled to an allowance for payments made on account thereof, with interest upon each payment from the date thereof. (373, 374)

6. TENDER. *Effect.* Tender of more than the amount of the debt stops interest from the date of the tender. (373)

Error to Rio Grande District Court.—Hon. CHARLES C. HOLBROOK, Judge.

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Mr. JESSE C. WILEY, Mr. HORACE N. HAWKINS, Mr. STEPHEN W. RYAN, for plaintiffs in error.

Mr. JESSE STEPHENSON, Messrs. GOUDY & TWITCHELL, Mr. J. H. BURKHARDT, for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This action was by the Gibbses to compel the Wallaces to accept a certain sum as due from the Gibbses on a note payable to the Wallaces, and to surrender the note; also to reassign and deliver a certain contract for the purchase of land by the Gibbses from a railroad company, assigned to the Wallaces as security for the payment of this note.

The complaint alleges the execution of sundry instruments and conveyances between the parties, and the facts following, whereby it was alleged that the Gibbses were entitled to this relief. In their answer, the Wallaces admit the execution of these instruments, but allege, that regardless of the language in the contract and the deed to certain Kansas land, given by the Gibbses to the Wallaces, that it was agreed in the event this land was taken by the Wallaces as part payment of their indebtedness, the amount of an incumbrance existing thereon at the time the deed was executed should be deducted from the price at which it was to be taken. The deed states that the grantees assume and agree to pay this incumbrance, but the Wallaces, in their answer, allege that by mutual mistake this portion of their contracts, by which this deduction of the Kansas incumbrance was to be made, was omitted from the instruments, etc. They also allege that the Kansas land, as well as the railroad land, which is in Colorado, was taken for security only. They ask for an accounting, for reformation of the instruments, and that both tracts of land

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be ordered sold, etc. Trial was to the court, which found, that all the property had been pledged as security only for the debt; that the deed for the Kansas land was intended as a mortgage; that the debt had never been paid; that the amount due was $15,319.96. On this finding decree was entered which provided that the Kansas land, as well as the contract for the railroad land, be sold. The Sheriff of Rio Grande county was appointed to make the sale. The decree commands that the Gibbses should also execute and deliver a quit claim deed to the Kansas land to the grantee named in the Sheriff's deed. The Gibbses bring the case here for review.

The contract, under which the deed to the land was executed, sets forth, that the Gibbses had conveyed the Kansas land to the Wallaces, and had executed their note to them for $10,750.00, due in three years, with interest at six per cent; that the Gibbses should have possession during said period, or until sold as therein stipulated. Also, it in part, reads:

"But in case said parties of the second part (the Gibbses) fail to either sell said lands or pay their said promissory note as aforesaid then in that case the title of said above described lands shall be and remain in the said parties of the first part (the Wallaces), and said parties of the second part shall be credited on their said promissory note the sum of Eleven Thousand, Two Hundred Dollars."

The Wallaces urge, that this was an attempt to fix the rights of the parties in the event that the Gibbses should fail to either sell the land or pay their note; that the deed was in fact intended as a mortgage; that the clause in the contract whereby the Gibbses agreed to cut off their right of redemption was invalid. Assuming that this is correct, it should not defeat that portion of the contract whereby the Wallaces agreed that in case

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this land was not sold prior to the expiration of the three years, they would take it, and credit the Gibbses with $11,200.00 upon their note, when the Gibbses were not seeking to take advantage of that clause, and when their action in tendering to the Wallaces an amount in payment of the balance, after this credit is given, and their demand for the credit and the cancellation of the note, would be a consideration for the subsequent transaction sufficient to vest the title in the Wallaces.—*Wynkoop v. Cowing,* 21 Ill. 570.

These acts would also estop the Gibbses from claiming that the deed did not convey a good title to the property.—16 Cyc. 802-805; Vol. 2, Jones on Mortgages, (5th ed.), Sec. 1050.

We cannot agree that the declaration of absolute title at a certain date was the real or any material consideration for the execution of the instruments by the Wallaces, but to the contrary, the record discloses that at the time of the execution of these instruments, the Wallaces were anxious to secure the title to this land as security for the amount then owing them by the Gibbses, and as one of the inducements to thus pledge it, they agreed in case the Gibbses failed to pay the note that they would take the land at $11,200, and credit this amount upon the note. This was a material inducement for the Gibbses to enter into the contract because at the time of its execution they had never seen the land, but one of the Wallaces had inspected it for them, and it was upon the strength of his report and recommendation that they accepted it in a trade. Under such circumstances, in order to get it pledged to them as security, the Wallaces agreed that under certain conditions which might arise, they would take it, and credit the Gibbses $11,200 on their note, and we see no reason why they should not be held to the terms of their contract in this

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respect. The real consideration for this agreement to purchase and indorse was the pledging of the security. This consideration has not failed, and did not lack mutuality. As sustaining this conclusion, we call attention to the following authorities.—9 Cyc. 327; Vol. 1, Page on Contracts, Sec. 302; *Bryant v. Gale,* 5 Vt. 416; *Spear v. Orendorf,* 26 Md. 37; *Turpie v. Lowe,* 114 Ind. 37, 15 N. E. 834; *Montgomery L. & P. Co. v. Montgomery Traction Co.,* (C. C.) 191 Fed. 657; *Hayes v. O'Brien,* 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555.

We further call attention that the record discloses that this alleged lack of mutuality was not the reason why the Wallaces refused to comply with this provision. Neither did they object because the Gibbses had failed to tender a quit claim deed when demanding that the indorsement be made, and no such deed was ever requested, but to the contrary, the ground for their refusal was the contention which had arisen over the $2,500 first mortgage. In commenting upon this, counsel for the Wallaces, in part, say:

"The Gibbs, to use a slang phrase, tried to 'put one over' on the Wallaces by having them assume the $2,500.00 mortgage in the deed.

If this trick had not been played on the Wallaces, or if the Gibbs had not tried to over-reach them, there would never have been any question in this case. The Wallaces would have taken the land at $11,200.00 free from the mortgage, and have credited that amount on the Gibbs note, upon the Gibbs giving to them a subsequent deed for their equity of redemption, * * *.

The Wallaces have always stood ready and willing to take over the Kansas land for $11,200.00 clear of the mortgage, and are now ready and willing to do so, but instead of so doing, the Gibbs are insisting, contrary to the terms of the contract alone, but relying upon the

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clause in the deed, improperly put there by the attorney for the Gibbs, that the Wallaces should take over the Kansas land at the excessive price of $13,700.00, or, in other words, by crediting the Gibbs $11,200.00 and assuming and paying the mortgage of $2,500.00."

In the former opinion, upon account of the error in refusing to recognize as valid the clause to purchase, etc., we reversed the judgment and remanded the cause for a new trial upon this issue of mutual mistake. Upon account of conditions which have occurred subsequent to the former trial, counsel have joined in a request that we determine that question upon the record as presented and make final disposition of the case; it being in equity, we have decided to do so.

The contract, in substance, states that the Gibbses have this day conveyed to the Wallaces the Kansas land, and that the Gibbses have this day executed and delivered to the Wallaces their note for $10,750.00 with interest at six per cent per annum due May 4, 1909. The Wallaces agree that the Gibbses shall have possession of the land until May 4, 1909, or until sold as therein provided. The Gibbses agree if sold before May 4, 1909, to turn over the proceeds in payment of the note as far as it will go.

The Wallaces agree that if the Gibbses shall pay their note on or before May 4, 1909, they will reconvey if land has not been sold. It neither is accomplished, it is then provided in substance that the Wallaces shall keep the land and credit $11,200 on the note. The deed for the Kansas land from the Gibbses to the Wallaces includes the following:

"That the same are free and clear from all former * * * incumbrances * * * except a certain mortgage to the Warren Mortgage Company to secure the payment of $2,500.00 with 6½ per cent. interest per an-

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num, which said parties of the second part assumes and agrees to pay."

These instruments bear date May 4, 1906, but were not executed until May 17th following.

It is elementary that where two instruments are executed at the same time between the same parties pertaining to the same transaction, or in part concerning the same matter, in order to arrive at a correct conclusion of what is intended on the subject covered by both, they should be considered and construed together. When thus considered, the language in these instruments sustains the Gibbses' contention. This is not seriously challenged by the Wallaces as in their pleadings they accept it as correct, but seek to avoid their effect by alleging a mutual mistake, as follows:

"Sixth. That it was the agreement and understanding between the plaintiffs and defendants that said Kansas land was to be conveyed to these defendants as security only, and in the event of being taken by defendants as part payment of their said debt the then outstand encumbrance against the same amounting to the sum of $2,687.50, together with any interest and taxes that defendants might be required to advance and pay to protect and preserve said Kansas land and said land contract as security, should be deducted from said sum of $11,200, the price at which said Kansas land was to be taken by the defendants.

And these defendants allege that at the time said agreement set out in paragraph 5 of said complaint was made, executed and delivered, the part of the agreement between the parties thereto as in this paragraph sixth alleged was, by the mutual mistake of the parties thereto, omitted from said agreement as written."

This was denied by the Gibbses and presents the real dispute which brought about this controversy.

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In Vol. 11, Ency. of Evidence, p. 38, in commenting upon the burden of proof in such cases it is said:

"In General.—A party seeking a decree reforming a written instrument not only has the burden of proof as does a plaintiff in an action generally, but must produce sufficient evidence to rebut the strong presumption created by the existence of the written instrument itself."

At page 47, it is also said:

"It is the general rule that a party seeking reformation of a written instrument must produce more than a mere preponderance of evidence, in order to authorize the court to grant the relief sought."

These rules obtain in this jurisdiction.—*Wilson v. Morris,* 4 Colo. App. 242, 36 Pac. 248; *Insurance Company v. Smith,* 10 Colo. App. 121.

See also.—*Maxwell Land-Grant Case,* 121 U. S. 325, 30 L. Ed. 949, 17 Sup. Ct. 1015; Vol. 2, Pomeroy's Equity Jurisprudence, (3rd ed.) Sec. 859.

When tested by these rules, a careful study of the evidence convinces us that the Wallaces have failed to establish any mutual mistake pertaining to the contents of the instruments. It would accomplish no good purpose to comment upon it, further than to state it is insufficient to overcome the strong presumption created by the evidence of the written instruments, for which reason they must be allowed to stand as written and the accounting between the parties be made accordingly.

In this connection we call attention that the record discloses there was a second mortgage upon the Kansas land to secure what is termed commission notes in the sum of $187.50, which the Wallaces paid. This did not come under the provisions of the contract and deed, and the Wallaces should be reimbursed for these payments with interest at eight per cent from the dates paid. They also paid $38.50 taxes upon the railroad lands, for which

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they are entitled to be reimbursed with interest; also, for taxes paid on the Kansas land in the sum of $94.37 with interest from the dates paid. They also paid $62.50 interest which had accrued upon the Kansas first mortgage note prior to the date of the deed for this land, and they are entitled to this money with interest.

We cannot agree that they should be reimbursed for the interest paid upon the Kansas mortgage, accruing after the execution of the contract and deed, as this would be in conflict with their terms when construed together by which the Wallace's assumed and agreed to pay this incumbrance with interest, which, as we construe it, means from that date, and that the later credit of $11,200 was intended for the equity, subject to this incumbrance with interest, as the deed states to hold otherwise would be to give no force or effect to the language used.

In the circumstances of this case we cannot agree that the tender of the Gibbses' $1,500 in payment of the balance due on this note was not sufficient to stop the running of interest on that amount from that date. This amount was more than sufficient to pay the balance due upon the note and interest proper, and was not refused for this reason, nor for the reason that any taxes or back interest upon the $2,500 mortgage or the commission mortgage had not been paid, but upon account of the contention over the payment of the first mortgage. This contention having been decided in favor of the Gibbses, the interest on the $1,500 due the Wallaces should cease at the date of this tender.

To, in part, recapitulate, our conclusion is, that at the date of the maturity of the note, May 4, 1909, which was also the date of the tender, the account should stand as follows:

Principal of the Gibbses note.....$10,750.00

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Less a credit indorsed by the Wallaces for discounts on bills of the Gibbses paid by the Wallaces under another contract.....	76.91
Balance due Wallaces on note.....	$10,673.09
Interest May 4, '06 to May 4, '09.....	1,921.15
Total amount due on note.....	$12,594.24
Credit for Kansas land, as per contract.....	11,200.00
Balance due Wallaces.....	1,394.24
Taxes paid by Wallaces on lands.....	132.67
Commission notes paid by Wallaces.....	187.50
Interest due on first mortgage note before execution of contracts paid by Wallace.....	62.50
Interest on last three items at 8% from date paid until May 4, 1909.....	50.19
Total due Wallaces on all items May 4, '09....	$ 1,827.09

Interest should cease on $1,500 of this amount upon account of the previous tender from this date, but should be added upon the balance, viz, $327.09, at eight per cent per annum from this date, until the date final decree is rendered.

For the reasons herein stated, the judgment is reversed and the cause remanded with instructions to enter a decree adjudging the Gibbses to be indebted to the Wallaces in the sum of $1,827.09, with interest upon $327.09 of this amount at eight per cent per annum from May 4, 1909, until the date of the decree hereafter to be entered, and that in case the Gibbses pay this amount to the Wallaces, or into court for them, within ninety days thereafter with interest at eight per cent per annum from the date of the decree, and also execute and deliver with said payment to the Wallaces, or into court

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for them, their quitclaim deed for the Kansas land, and also pay the Wallaces an amount equal to any subsequent advances made by them upon behalf of the railroad land, if any, and interest thereon from the dates paid, that the Wallaces be commanded to reassign to the Gibbses the contract for the railroad land and quitclaim to them any right, title and interest that they may have, or are entitled to acquire, on account of the assignment of said land contract to them, and also to cancel and surrender to the Gibbses the promissory note herein referred to, and that in case the Gibbses shall fail, refuse or neglect to make payment of said amounts, and to execute and deliver said quitclaim deed as aforesaid, within the time herein provided, that the decree provide for the sale of the railroad land contract and of all the right, title and interest of the parties hereto to the lands therein described and acquired thereunder, as in cases of foreclosure of mortgages on real estate for the purposes of satisfying the indebtedness as herein determined and any other subsequent advances made upon the railroad contract, and if the amount received at such sale be insufficient for this purpose, a deficiency judgment be entered as in foreclosure cases, and that in case of such sale the Gibbses be commanded to execute and deliver their quitclaim deed to the Wallaces to the Kansas land as hereinbefore provided, and that in default the clerk of the district court of Rio Grande county be empowered to execute it for them with the same force and effect as if executed by them. The costs in both courts should be taxed against the Wallaces. The former opinion is withdrawn.

Reversed and remanded with instructions.

Decision *en banc.*

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Decided July 8, A. D. 1914. Rehearing granted January 4, 1915. Decided on Rehearing April 5, A. D. 1915.

[No. 7553]

DENVER HORSE IMPORTING COMPANY V. SCHAFER ET AL.

1. EVIDENCE. *Parol Inadmissible.* All prior negotiations merge in the writing finally executed to evidence the agreement of the parties. (380)

2. PLEADINGS. *Complaint Upon a Warranty of Personalty,* must show, not only the warranty, but substantial compliance with the conditions imposed by the contract, or facts excusing non-compliance.

The complaint counted upon the warranty of a stallion as a reasonably sure foal-getter. The contract of sale obligated the purchaser to proper feeding, etc., and other conditions. A complaint not showing compliance with these conditions nor excusing failure in that behalf states no cause of action. (381)

3. DAMAGES. *Measure,* in an action for the breach of a warranty of chattels is the difference between the market value of the chattel, at the time and place of the sale and delivery, if it had corresponded with the warranty (even though in excess of the agreed price), and its actual value with its then existing defects, together with any special damages necessarily resulting from the breach of the warranty. (382, 383)

The purchaser is to be allowed the expense of the keep of the animal, only up to the time when the breach of the warranty became definitely known. (389)

Interest is not to be allowed upon the damages. (390)

The purchaser having retained the animal, the seller is entitled to an allowance for his value, for other purposes than that for which he was purchased. (383)

4. ——*Loss of Profits.* The loss of profits during the breeding season is too speculative and remote. (389)

5. ——*Several Plaintiffs—Part Only Prevailing.* In an action

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upon a contract, by several plaintiffs, as to only a part of whom the action is sustained, the recovery is the same as if all were entitled. (391)

6. EVIDENCE—*Presmptions.* The price at which a chattel is sold is presumed to be the real value where there is no other evidence upon the question. (384)

7. CONTRACTS. *Construed.* Contract for the sale of a stallion, with a warranty, followed by the words "or it will replace said horse with another of equal value." The liability of the seller is not limited by this alternative. If the animal was not as warranted the seller is liable in money damages. (384)

Though the contract for the sale of a stallion provides that upon certain conditions, to be kept by the purchaser, the horse "will prove to be a reasonably sure foal-getter," the warranty is as to the present condition of the animal. (388)

8. FRAUD. *Who May Complain.* Action upon a contract by several plaintiffs. Fraudulent representations on the part of some of the plaintiffs, made at the instance of the defendant, and inducing the others to enter into the contract, is no defense to the action. (390)

9. CHANGE OF VENUE. *Place of Performance of Contract—Action for Tort.* Action for the breach of the warranty of a stallion as a sure foal-getter. The warranty was upon certain conditions as to the manner of feeding and handling by the purchaser, the class of mares to which a stallion should be bred, and monthly reports to the seller of the names of the mares, with the name and address of the owners. Fraudulent misrepresentations inducing the purchase were alleged. Plaintiffs were farmers residing at the County of Lincoln. *Held* that under Sec. 27 of the code, the action was properly brought in the County of Lincoln, both because that was the county where the contract was to be performed, and because of the character of the action as one of tort; and that defendant was not entitled as of right, to change the venue to the county of its residence. (389)

Error to Lincoln District Court.—Hon. W. S. MORRIS, Judge.

Mr. R. BURGE TONEY and Messrs. O'DONNELL, GRAHAM & O'DONNELL, for plaintiffs in error.

Mr. HENRY TROWBRIDGE, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

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The plaintiff in error, defendant below, on the 12th day of April, 1909, sold to the defendants in error, plaintiffs below, a stallion for breeding purposes, at the price of $4,000, under and according to the terms of a written agreement of that date duly executed. This agreement is entitled "BILL OF SALE AND AGREEMENT," and omitting formal parts, is as follows:

"Know all men by these presents, that The Denver Horse Importing Company, of Denver, Colorado, for and in consideration of the sum of four thousand dollars have this day sold the registered Percheron Draft Stallion named "Gosse," 17685 (69735), weight 1865 lbs. to the undersigned purchasers, who have examined said horse and received him in good condition and made payment for him as follows: No cash, and notes of even date herewith: One for $1334.00, payable on or before November 1, 1909. One for $1,333.00, payable on or before November 1, 1910. One for $1,333.00, payable on or before November 1, 1911.

That said, The Denver Horse Importing Company assumes no responsibility on account of disease or accident to said horse after delivery, but guarantee him to be an imported registered Percheron stallion, and that, with proper feeding, handling, exercise and care he will prove to be a reasonably sure foal-getter, if properly bred to healthy producing mares, returned for trial at proper periods, or it will replace said horse with another one of equal value, provided said horse sold, is returned to said Company at its nearest stable in as healthy, sound and good condition as he is at present, together with all pedigrees and certificates of registry.

In consideration of the delivery of said horse, it is understood and agreed that this guarantee is binding on the said The Denver Horse Importing Company, only on the express condition that the purchasers of said

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stallion strictly comply with all their obligations, and the tenor and effect of their said promissory notes, and that, between the first and tenth day of each month, during the entire breeding seasons each year, while the horse is being tested, they furnish The Denver Horse Importing Company at Denver, with the written name and description of each mare bred, the date she was bred and the name and address of the owner of same, time being made the essence of this agreement.

It is agreed that this is the sole contract between the parties hereto, and is not subject to change or alteration, either written or verbal, by any representative or agent and is not transferable."

The complaint alleges two causes of action. The first of these is based upon allegations of fraud and deceit upon the part of the defendant, in representing to the plaintiffs, purchasers, that the stallion was a sure foal-getter when in fact he was not, with the usual allegations in such case as to the knowledge upon the part of the defendants, want of knowledge upon the part of plaintiffs, and their reliance upon the allegations made by the representatives of the defendant in that respect. The second cause of action was upon the said written contract of sale. The prayer in both instances was for damages and not for rescission of the contract.

The case was tried to a jury, and verdict and judgment rendered in favor of the plaintiffs below, in the sum of $4,400. Timely objection was made that neither the first nor second counts state a cause of action, which in law entitles the plaintiff to recover.

It appears that prior to the actual sale, the stallion was exhibited through the community where the defendants in error reside, and as consent was obtained from each of them, his signature was secured to a written agreement to purchase the animal upon the terms as

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recited in the agreement above stated, and as finally consummated, each of the purchasers agreeing to take one share at the value of $400, provided ten signatures could be so obtained, thus making the purchase price of the stallion $4,000.

Under both causes of action items of damages were claimed as follows: (a) $2,200 for loss of the entire breeding season for the year 1909; (b) $560 expended by plaintiff for keep and maintenance of the stallion; (c) $1,184.90 with interest thereon since the first day of November, 1909, paid on the first of three promissory notes, set forth in the contract; and (d) the sum of $2,600 with interest thereon since the 12th day of April, 1909, for the value of two remaining notes outstanding.

There is but little, if any conflict in the testimony material to the case. The three notes were sold by the defendant prior to maturity, and to an innocent purchaser. The first of these notes, less credits given by the defendant thereon, and in the unpaid sum of $1,184, had been paid to the holder by the plaintiffs below, prior to the commencement of this action. The stallion was found to be barren and unfit for breeding purposes.

It is plain that the plaintiffs were not entitled to recovery under the first cause of action in the light of the facts thus appearing, both from the pleadings and from the evidence. This, if for no other reason, than that all agreements and negotiations appear plainly to have merged in the final agreement above set out, and that for such reason whatever rights plaintiffs below may have in the premises, must be based upon breach of the warranty contained in such agreement. The question as to whether or not the plaintiffs were entitled to recover under the second cause of action as pleaded, has been one of more serious concern for the court.

Holding as we do that the plaintiffs right of recov-

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ery, if any, must be based upon the written agreement and contract of warranty, and it appearing likewise that this action must be held to be one not in rescission of contract, but for breach of warranty, the suit is one in damages alone, for breach of the written agreement.

It is elementary that in a suit for damages for a breach of warranty, before the plaintiff may recover, he must not only plead the contract of warranty, together with the breach thereof, but in addition thereto, a substantial compliance upon the plaintiff's part, with his obligations contains in such contract, or in the event of a failure to so comply, then such facts as may sufficiently constitute a waiver or excuse, for non-compliance.

Clearly there are no such allegations upon the part of the plaintiffs, contained in the second cause of action. The contract in this case obligated the plaintiffs to proper feeding, handling, exercise and care, together with proper breeding to healthy, producing mares, returned for trial at proper periods. The warranty was further upon the express condition that the purchasers should strictly comply with all their obligations, and that between the first and last days of each month during the entire breeding seasons each year, while the horse was being tested, to furnish The Denver Horse Importing Company at Denver, with the written name and description of each mare bred, the date she was bred, and the name and address of the owner of same.

There is likewise no allegation in the second cause of action that the plaintiffs complied with all or any of these requirements, nor that there was a waiver by the defendant of any such requirements, nor that the plaintiffs were for any reason excused from a compliance with such obligations.

Plainly the complaint for such reason does not state a cause of action under the second count. Neither was

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this defect cured by the answer nor by the replication. For this reason the judgment must be reversed.

Inasmuch as the case may probably be retried, it seems important that other questions raised and argued should be considered.

Counsel for the defendant company, complain of instruction No. 9, given by the court, concerning the measure of damages in this case. This instruction is as follows:

"The court instructs the jury that if you find the issues herein joined in favor of the plaintiffs and against the defendant, you have the right to assess as the plaintiffs' damage the difference between the value of the stallion in question for the purposes for which he was sold and purchased and the actual price agreed to be paid for him, which under the evidence in this case should not be a greater sum than $3,400."

The instruction was erroneous. The universal rule as to the measure of damages in an action upon breach of warranty, for chattels sold and delivered, is the difference between the value which the chattel sold would have had in the market at the time of the sale and delivery if it had corresponded with the warranty; and its actual value with the defects, together with such special damages as were the natural consequences of the breach of warranty or the fraud.—*Smith v. Mayer,* 3 Colo. 207; *Lilley v. Randall,* 3 Colo. 298.

Evidently the case was tried upon the theory of the plaintiffs accepted by the court, that it was an action for the recovery of the purchase price of the animal. The jury should have been instructed to ascertain the value of the horse, at the time of the sale for the purposes for which he was sold, if he had been so warranted, and his value at the time of the breach of the warranty for any other purpose, and that the plaintiffs' damages if any,

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were to be measured by the difference between these two sums. The plaintiffs have elected to keep the horse, and the defendant is entitled to its value for purposes other than that for which it was sold.

The plaintiffs were entitled to prove the real value of the horse at the time of the sale, if he had been as warranted, whether this exceeded the contract price or not. 30 Am. & Eng. Enc. 211, 212. Upon this point it was said in *Young v. Vannatta,* 113 Mo. App. 550, 88 S. W. 123:

"The court admitted evidence offered by plaintiff fixing the market value of the bull, had it been in the condition as warranted, at a sum exceeding the purchase price paid; and the jury was directed, 'if they found for the plaintiff, to allow him as damages the difference, if any, between the value of the bull as it would have been, had said bull been of the kind and character as warranted by defendants, or either of them (if you find they did warrant it, as defined in another instruction), and its actual value, if any, as shown by the evidence at the time and place of sale.' The rule followed is supported by the great weight of authority.—*Narr v. Norman,* 113 Mo. App. 533, 88 S. W. 122; *Chandler v. Lopus,* 1 Smith's Leading Cases, Pt. 1, p. 365; *Erggio v. Braggiotti,* 7 Cush. (Mass.) 169; *Brown v. Weldon,* 99 Mo. 569, 13 S. W. 342; *Layson v. Wilson,* 37 Mo. App. 636; Sutherland on Damages, Sec. 670; Benjamin on Sales, (7th Ed.) Pt. 2, p. 962. But defendants say the recovery should be limited to the purchase price paid. We do not think so. Plaintiff should be compensated for the actual loss sustained through defendant's wrongful breach of contract. The bargain he made, but failed to realize, is a part of his actual loss, for which he must be reimbursed."

There seems to have been no other testimony in this case as to the value of the horse at the time and for the

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purpose for which he was sold, than the contract price, which was $4,000.

In the absence of other testimony as to value, this was sufficient. Where there was no other evidence of the real value of the article than the contract price, that is presumed to be the real value.—*Seigworth v. Leffel,* 76 Pa. St. 467.

The rule in *Seigworth v. Leffel, supra,* that the contract price is sufficient evidence of the value for the purpose for which the article was sold, is sustained in *Smeltzer v. White,* 92 U. S. 390, 23 L. Ed. 508. This rule was recognized in *Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 61 Pac. 483. The cases cited seem to be in harmony with the general trend of authority.

It is urged by counsel for the plaintiffs in error, that by the terms of the written contract, the company was bound only by the alternative in the agreement, "or it will replace said horse with another one of equal value, etc." and having tendered to the plaintiff another horse of equal value, it is absolved from further obligation under the contract. This is not tenable. The contract contains an express warranty in that it guarantees the horse to be an imported registered Percheron stallion, and that, with proper feeding, handling, exercise and care he will prove to be a reasonably sure foal-getter, if properly bred to healthy, producing mares, returned for trial at proper periods.

The proposition to replace the horse is clearly in the alternative and follows the warranty, being connected by the disjunctive word "or," which, when used in this sense, is defined by Webster as "A co-ordinating particle that marks an alternative; as you may read or may write,—that is, you may do one of the things at your pleasure, but not both. It often connects a series of words or propositions, presenting a choice of either.

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Counsel for the company, to sustain its contention, cite *Beckett v. Gridley,* 67 Minn. 37, 69 N. W. 622; *Acme Harvester Co. v. Ernie,* 63 Kan. 858, 66 Pac. 1004; *Electric Co. v. Pulley Co.,* 11 Colo. App. 300, 52 Pac. 1030; *White v. Stelloh,* 74 Wis. 435, 43 N. W. 99; *McQuaid v. Ross,* 85 Wis. 492, 55 N. W. 705, 22 L. R. A. 187, 39 Am. St. Rep. 864; *First Nat. Bank of Ft. Collins v. Hughes* (Cal.) 46 Pac. 272; *DeWitt v. Berry,* 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896.

In *Beckett v. Gridley, supra,* the principal question was as to notice to the vendor of the failure of the warranty, a question not in this case, and the warranty was expressly limited to a return of the horse or a cancellation of the notes; but the language used in the opinion does not sustain the contention of the company here, in that it holds that the option was with the seller to make substitution of the chattel sold.

In *Acme Harvesting Company v. Erne, supra,* the case turned upon failure of the plaintiff to prove a breach of the conditions of the warranty. In so far as applicable, the case of *White v. Stelloh, supra,* is directly opposed to the contention of the defendant company, for the court in that case approved the following instruction:

"If you find that the defendant made an express warranty that the bull calf would be a sure stock-getter, in order to induce the plaintiff to purchase him, and that the plaintiff relied upon such statement of the defendant, and at the time of such warranty or statement there existed a defect or unsoundness in the calf which would result in his being sterile or not a sure stock-getter, and that such was the result, then you should find for the plaintiff."

In *McQuaid v. Ross, supra,* there was no express warranty involved and the doctrine of *caveat emptor*

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was held to apply. The question of implied warranty is not within the present case.

First National Bank v. Hughes, supra, was a warranty strictly restricted and limited to the substitution of another horse. The doctrine as to the right of recovery under such limited warranty was stated in *Electric Co. v. Patent Pulley Co., supra,* to be:

"But the defendant, equally with the plaintiff, is bound by the terms of the contract of warranty, because it was the contract in pursuance of which it purchased the goods, and as that contract fixed the limits of the plaintiff's liability, there can be no recovery against it, excepting within those limits."

It is the settled rule of law that contracts which contain a provision for the return of the property and a rescission of the contract, or for a substitution of other property for that which fails to comply with the warranty, are not treated as exclusive in the remedy provided, unless such intention is clearly expressed by the language and terms of the warranty.

In the case of *Douglas Axe Mfg. Co. v. Gardner,* 10 Cushing, the question under consideration was fully considered. This case has been from that time very generally cited and approved. It was there held:

"When a seller, in addition to a warranty of property makes a promise to take it back if it does not conform to the warranty, we cannot hold that such superadded promise rescinds and vacates the contract of warranty. We are of opinion that, in such case, the buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach ot warranty."

In *Shupe v. Collender,* 56 Conn. 498, 15 Atl. 405, 1 L. R. A. 339, the court said:

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"It is true that the defendant here sets up an agreement of the plaintiffs that he might rescind the contract of purchase on giving notice to them, if the planer did not correspond with the warranty, in which case they were to remove it. But this agreement did not deprive the defendant of all other remedy. It remained optional with him whether to avail himself of this special remedy or to resort to his remedy at law. The contract was clearly a sale of the planer with a warranty, to which was superadded an agreement that the plaintiffs would take it away if it proved unsatisfactory, on receiving notice to that effect. This superadded provision did not impair at all the warranty or the defendants right of action upon its breach."

In *Moore v. Emerson,* 63 Mo. App. 137, which was an action for breach of warranty in the case of a jack warranted to be a sure foal-getter, the court held:

"The collateral contract of warranty, *supra,* contains, in addition to the express warranty of breeding qualities in the animal sold, an agreement on the part of the seller to take him back and give another in exchange, if he fails to fulfill the warranty in a specified time. It does not contain any term or stipulation binding the purchaser to exercise the right to return the animal afforded him by the agreement of the vendor. Still less is there anything in the contract evidencing an agreement on the part of the purchaser to return the animal. As far as the obligations of the contract are concerned, they are unilateral and rest upon the vendor. It is the well settled law in this country that a right of action for breach of warranty exists, although the vendor expressly agreed to take back the animal if it failed to correspond to the warranty. In such case the right to return is merely a cumulative remedy."

Lord Ellenborough gave as one of the reasons for

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the rule here adopted, that the plaintiff was not bound to take another watch in exchange; he could go on to the end of the chapter if he were obliged to take bad for bad.—*Wallace v. Jarmen,* 2 Starkie, 360.

In *Elwood v. McDill,* 105 Ia. 437, 75 N. W. 340, the court said:

"The contract of warranty given with Freycinet provided, that, if he should not be as warranted, he might be returned, and if in as good condition as when sold, exchanged for another horse of fair value, or the purchase price be refunded. It is claimed by the appellant that Caprice was taken subject to that warranty, and that it was the duty of defendant to return him when he proved to be not as warranted. The contract did not, however, provide for the return of the horse, if not as warranted, to the exclusion of other methods of procedure and other remedies. In that respect it is similar to the contracts considered in *Love v. Ross,* 89 Ia. 400, (56 N. W. 528) and *Hefner v. Hayes,* 89 Ia. 616, (57 N. W. 421,) which were held to give to the purchaser the option to return the stallions purchased, or to retain them and recover damages caused by the breach of warranty."

This seems to be the overwhelming weight of authority, and we are of opinion that the right of the plaintiffs in this case, the breach of the warranty being established to recover upon the warranty, is clear.

Counsel for the company contend further, that the contract of warranty was in *futuro* and not in *praesenti,* but no authority is cited to sustain this contention. This is novel but not sound. The sale was absolute and the warranty of the animal was as it was when sold. The warranty was that the stallion would prove his fitness for the purpose for which he was sold, and this of necessity implies a present fitness. We have only to refer counsel

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for authority to the case of *White v. Stelloh, supra,* cited by themselves, and which involved the warranty of a bull calf but three months old at the time of the sale. The defendant in apt time and upon a showing that its residence, general offices and place of business was in the city and county of Denver, moved for a change of venue to that county. Section 27 of the code provides that actions upon contract may be tried in the county where the contract is to be performed, which in this case must be held to be the county where this action was commenced. The same section provides that actions for torts may be tried in the county where the tort is committed. So that the defendant was not entitled to a change of venue as a matter of right, and the motion was properly overruled.

The court very properly excluded from the jury the question of damages because of plaintiffs alleged loss of profits for the breeding season, as being too speculative and remote.

The special damages claimed for cost of keeping and maintaining the stallion, was not sufficiently pleaded, nor was there anything contained in the instructions to the jury, or otherwise, that limited this item to any particular period, for which the horse may have been so kept.

The plaintiffs may recover in such a case as special damages, the expense incurred in keeping the stallion for the purpose for which he was being kept, up to the time only that a breach of warranty became definitely known. This, together with the items and amount of damage in this respect, should be pleaded and proven with reasonable particularity.—*Hodgman v. S. L. & S. R. Co.,* 45 Ill. App. 375; *Glidden v. Poolen,* 50 Ill. App. 36.

It also appears from the record that the jury found interest on the amount of damage allowed. This was

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error. It has been held that interest in this state is a creature of statute and regulated thereby. It is only recoverable in the absence of contract, in the cases enumerated in the statute. An action in damage for a breach of warranty is not one of the enumerated cases. —*D. S. P. & R. R. Co. v. Conway,* 8 Colo. 16, 5 Pac. 142; 54 Am. Rep. 537.

There is a question raised as to the right to recover, upon the part of three of the plaintiffs whom it was alleged fraudulently induced the remaining plaintiffs to enter into the contract of purchase. Under our view the action herein must stand upon the written agreement between the parties, and under which all are alike liable.

The plaintiffs all join in this action. The defendant company cannot complain of any alleged fraud upon the part of the three plaintiffs. If there was such fraud it was induced by the defendant. Beside the judgment must be for the same amount, whether in favor of a part, or all the plaintiffs.

The judgment is reversed with instructions to permit the parties to amend their pleadings as they may be advised, and to proceed in conformity with the views herein expressed.

En banc.

MUSSER, C. J., not participating.

On Petition for Rehearing.

Per curiam; en banc.

In support of the petition for rehearing it is claimed that the second cause of action does not show upon its

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face that it is based upon the written contract. It is also claimed that this cause of action is aided by the answer and reply, and that from these pleadings as a whole, it appears a cause of action was stated on that contract. It is further claimed that the cause was tried without objection, as though proper issues had been made up in an action on the written contract.

The testimony conclusively established that the only contract between the parties was the agreement and bill of sale, and that plaintiffs' cause of action is limited to a breach of the warranty which it contained. The complaint does not state a case for this breach, and even if, by the answer and reply, it should be conceded that a cause of action was stated for the breach of warranty contained in the written contract, plaintiffs did not make a case entitling them to damages for this breach. There was no testimony introduced to establish damages in conformity with the rule in such cases, and the cause was submitted to the jury upon an erroneous theory, as pointed out in the opinion. In this state of the record this court cannot, from an examination of the testimony, determine what damages the plaintiffs may be entitled to recover. In brief, before that question can be determined, the case must be tried upon a complaint which states a cause of action, by the introduction of testimony which tends to establish the issues of fact which plaintiffs must prove in order to make a case properly pleaded and submitted to a jury under appropriate instructions. Moreover, the case was submitted to the jury on both causes of action, and as the jury returned one general verdict, it is impossible to tell upon which cause of action the verdict was based.

Rehearing denied.

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Decided March 24, A. D. 1914. Rehearing granted July 14, 1914. Judgment affirmed on rehearing April 5, A. D. 1915.

[No. 7209.]

KETT v. COLORADO & SOUTHERN RAILWAY COMPANY.

1. MASTER AND SERVANT. *Employers Liability Act—Construed.* Under Sec. 1 of c. 67 of the Laws of 1901, the master was liable to a servant, for the neglects of a fellow servant, to the same extent as for his own neglects. (395)

And the servant was not required to give notice of the injury, as prescribed by sec. 2 of c. 77 of the Laws of 1893. So much of the former act as required the notice is repealed by the latter, and the repeal is not negatived by the proviso to sec. 2.—*Carlock v. Denver & Rio Grande Co.*, 55 Colo. 146 followed. (395, 396)

2. ——*Servant's Assumption of Risk.* The doctrine of Assumption of Risk has no place under c. 67 of the Acts of 1891. (398)

3. ——*Servant's Contributory Negligence—For the Jury*, save in the clearest cases, where the facts are undisputed, and intelligent men can draw but one inference. (399)

A switchman employed in the yard of a railway company, where trains and switch-engines are continually passing, is under duty, when walking upon the tracks, to exercise reasonable care for his own safety; but he has the right to assume that his fellow employes will exercise a like measure of care in the discharge of their duties. A switchman walking upon the tracks in the night-time looked behind him upon several occasions without discovering the approach of any danger, and was finally struck and injured by a locomotive moving backward, with neither light nor guard at the rear. The question of a servant's contributory negligence was for the jury. (399)

4. APPEAL AND ERROR. *Matters Not Alleged*, will not be considered in the Court of Review. (399)

5. EVIDENCE. *Judicial Notice.* That the duties of a switchman, employed in the yard of a railway company require him to be at times, upon the tracks, even though he is there exposed to great danger of injury. (398, 399)

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Error to Denver District Court.—HON. CARLTON M. BLISS, Judge.

MR. STERLING B. TONEY, MR. R. BURGE TONEY, MESSRS. CRUMP & ALLEN, MR. FRAZER ARNOLD, for plaintiff in error.

MR. E. E. WHITTED, MR. ROBERT H. WIDDICOMBE, for defendant in error.

MR. JUSTICE HILL delivered the opinion of the court:

This action was by the plaintiff in error to recover damages for personal injuries sustained while in the employ of the defendant railway company. The evidence discloses, that the accident occurred about 6 o'clock in the evening, January 23, 1909; that it was somewhat dark; that the plaintiff had missed or had been unable to get aboard the switch engine with which he was working as a switchman, which engine had just passed; that he was walking on the track in the direction it had gone when another engine belonging to the defendant came up behind him and struck him; that this engine was running backwards, as it is termed; that the plaintiff had looked back several times to ascertain if any other engine was following, but did not see any; that there was a headlight upon the rear of the engine which struck him; that it was customary and necessary, as a matter of safety, to have a light or lights lighted upon the rear of switch engines after dark; that at the time of the accident, the lamp in the headlight on the rear of the engine which struck him was not burning, at least no light was reflecting therefrom; that if it had been lighted that evening it had evidently gone out; that it was customary and proper to light them as soon as it commenced to get dark, and to keep them burning upon each end of a

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switch engine while it was being operated in the yards, until morning; that it was also customary and necessary, as a matter of safety, for a man to ride on the rear of a switch engine when it was going backwards; that, as per such custom, he rides on what is called the footboard, and after dark should have a lantern lighted and when he sees anyone on the track signals his engine to stop, if necessary, or hollers for him to get off, etc.; that at the time of this injury there was no one riding on the rear end of this engine, on the footboard or elsewhere; that it was the duty primarily of the fireman to have had this light lighted, so that it would have given the proper reflection at the time of this accident, and presumably the duty of the engineer as well to see that it was burning, when he was operating the engine after dark.

A motion for nonsuit was sustained upon the ground that the negligence which caused the accident was that of a fellow servant. In this the trial court erred. Section 1 of an act approved March 28, 1901, known as our employer's liability act, which was in effect at the time of this accident, makes the employer liable for the negligence of a fellow servant in cases of this kind, the same as he would be were the act committed by him. The contention is made, and was evidently accepted by the court, that because the plaintiff did not comply with the provisions of the act of 1893 in giving notice to the company, that he cannot recover under the provisions of the 1901 act.

It is claimed that section 2 of the act of 1893 requiring notice, applies as well to actions brought under the act of 1901. We cannot agree with this conclusion. To accept it would be to make the act of 1901 inconsistent within itself. The act is unlimited in providing, without qualification other than that the employe shall be in the exercise of due care, that every corporation, company or

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individual who may employ agents, servants or employes, shall be liable to respond in damages for injuries or death sustained by any such employe, etc., resulting from the carelessness, omission of duty or negligence of such employer, or which may have resulted from carelessness, omission of duty or negligence of any other agent, servant or employe of the said employer in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer. It repeals all acts and parts of acts in conflict therewith. It will be observed that this act does away with the defense of negligence by a fellow servant in all actions for personal injuries or death. In this respect it differs radically from the act of 1893. That act gave a cause of action against the employer for the negligence of a limited class of employes for whose negligence he was not liable at common law, and then only in cases where a certain notice was, within a certain time, given to the employer concerning it. It follows, that the part of the act of 1893 limits recovery to cases where a notice is given, is in conflict with the act of 1901 as thus far referred to, for which reason it was repealed by the later act, unless excluded from the repealing clause upon account of the proviso attached thereto which reads:

"Provided, however, that this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or in case of death, the right of the husband or wife, or other relatives of a deceased person, to maintain an action against the employer."

Was it intended by this proviso to prohibit the right of recovery given under the act of 1901 to cases where the notice provided by the act of 1893 was given? We

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do not think so. To so hold would be to make a part of the act of 1901 meaningless for the reason that it covers all classes of such cases without restrictions. To construe this proviso to mean that the act of 1901, without the service of notice, is limited to cases therein named not covered by the act of 1893, would be to say that while the legislature has in plain language said in all cases, they meant only those not covered by the 1893 act. Such an inconsistent construction is not to be accepted when any rational one consistent with the language used can be arrived at, for which reason we cannot accept it, and are of opinion that the proviso means nothing more than that the legislature did not intend to repeal any statute not in conflict therewith relating to the right of the injured, or in case of his death, the right of the husband, or wife, or relative, to maintain an action, etc. For instance, the one designating the person who might bring suit in case of the death of the injured party was unquestionably intended to be preserved. The language used is specially applicable to it, as well as to others, but as the question of what laws it did not repeal is unnecessary to determine other than parts of the act of 1893, we do not wish to be understood as passing upon this question other than to hold that it was not intended to make the notice part of the act of 1893 apply to any cause of action accruing under the act of 1901. This conclusion is strengthened by the title of the 1901 act which clearly discloses an intention to cover all cases concerning the negligence of fellow servants in the one act.

In Lewis' Sutherland Statutory Construction, Vol 1, (2nd Ed.), Section 254, it is said:

"A new statute which affirmatively grants a larger jurisdiction or power, or right, repeals any prior statute by which a power, jurisdiction or right less ample

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or absolute had been granted. If the exercise of a power granted by a legislative act may include going beyond limits fixed by a prior statute, such limitation is impliedly removed, at least so far as it conflicts with the doing of that which is subsequently authorized."

We think this rule somewhat applicable to the facts here. See also.—*Nicol v. City of St. Paul,* 80 Minn. 415, 83 N. W. 375.

We are not unmindful of the opinion in *Lange v. Union Pacific R. Co.,* 126 Fed. 338, 62 C. C. A., 48, wherein a different conclusion was reached, but in *Carlock v. Denver & Rio Grande Railroad Co.,* 55 Colo. 146, 133 Pac. 1103, we declined to follow the Lange case and held that nothing in the act of 1901 indicates that it is an amendment to, or to be considered as a part of, the act of 1893, but that the act of 1901 was complete in itself on that phase of the questions intended to be covered thereby. While in the Carlock case we found it unnecessary to decide whether the act of 1893 was still in force, as the case made did not come within the class mentioned by it, we did hold that the provisions of the act of 1893 pertaining to notice were not applicable to a case made under the act of 1901 not covered by the act of 1893, even though it was still in force. This opinion was in conflict with the ruling in *Lange v. Union Pacific R. Co., supra,* which we declined to follow, as is our present conclusion that a proper construction of the act of 1901 makes the notice part of the act of 1893 inconsistent therewith in so far as it would otherwise apply to any case made under the act of 1901. We think the fundamental error which our distinguished brethren of the United States Circuit Court of Appeals fell into in the Lange case, was their assumption that the considerations, limitations, and procedure of the act of 1893 were intended to apply to any case arising under the act of

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1901, and that the later act upon account of the proviso in the repealing clause or otherwise, was intended merely as an extension and enlargement or revision of the law upon the subject so that it carried with and into it the notice part of the act of 1893, when for the reasons stated in the *Carlock* case, *supra,* we held that it was intended to be complete within itself in its abrogation of the fellow servant rule without limitation.

By cross-assignments the defendant contends that the court erred in refusing to grant the nonsuit on the additional grounds: First, that the plaintiff was guilty of contributory negligence; second, that the injury was one which was assumed as a part of the dangers of the employment. If the motion should have been sustained for any reason presented, the judgment should be affirmed, even though the reason given by the court was erroneous. The assumption of the risk as to the negligence of the fellow servant is disposed of adversely to the contention of the defendant by the construction given to the act of 1901.

The claim that the plaintiff was guilty of contributory negligence as a matter of law for walking on the track, is not sustained by the testimony. The record discloses, that he was employed by the defendant company as a switchman in a busy switchyard, where there were numerous tracks of different distances apart with many connections from one to the other; that there were many men employed in these yards, day and night, and that many switch engines as well as trains were running in all directions, making various kinds of noises. There is no evidence that it was the duty of the plaintiff to at all times keep off of the tracks, but to the contrary, it is common knowledge that the duties of a switchman require that at times at least he be upon the tracks when the danger is as great as when the accident happened.

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For instance, when coupling cars, when between tracks where they come together when there is nowhere else to go, sometimes when crossing the tracks and other instances when he is expected to be upon them in the performance of his duty. 'Tis true, in such cases he is supposed, and it is his duty, to exercise reasonable diligence in looking out for his safety, but he has the right to assume that the other employes will exercise reasonable diligence in the performance of their duties, one of which, in this instance, was to have the headlights burning. The plaintiff testified that he looked back several times to see if any engine was following him but could see none. Under such circumstances, we think that the question of contributory negligence in this respect was for the jury. In *Phillips v. Denver City Tramway Company,* 53 Colo. 458, the question of contributory negligence was gone into at length where many of the former opinions of this court were considered with the conclusion as there stated, in substance, that only in the clearest cases, where the facts are undisputed, and where all intelligent men can draw but one inference, is the question of contributory negligence for the court, and especially is this true when the measure of duty is ordinary and reasonable care, that in such cases the standard of duty is variable. The case under consideration comes clearly within this rule.

The plaintiff claims that the company was guilty of negligence in omitting to promulgate rules requiring that a switchman ride upon the rear of an engine when backing in the yards. There is no allegation in the complaint of negligence in this respect, and the evidence is not clear that such a rule was not in force. The evidence is, in effect, that such a custom was at least prevalent and that it was proper and necessary for a switchman to be on the rear of the engine when backing in the

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yards. No issue having been made concerning the adoption of rules by the company, we think it improper to consider it. For the purposes of a new trial, the parties will be permitted to amend their pleadings as they may be advised.

The former opinion is withdrawn; the judgment is reversed and the cause remanded for a new trial in harmony with the views herein expressed.

Reversed and remanded.

Decision *en banc.*

Decided April 6, A. D. 1914. Rehearing denied February 1, A. D. 1915.

[No. 7589.]

HAWKINS v. ELSTON ET AL.

1. PLEADINGS. *Special Demurrer*, not containing the specification of causes required by the code (Sec. 57), will be treated as a general demurrer. (406)

2. TENDER. *When Must be Pleaded.* The complaint alleging that defendant, holding the legal title to lands, in fact as security for money, had repudiated the trust and asserted absolute title, praying an account, and a decree for a conveyance, upon payment of whatever might appear to be due, *semble* it need not allege a tender or offer to pay. (408)

3. PLEADINGS. *Construed.* The complaint alleging that Wood, holding the legal title to certain lands as security for money, had conveyed them to defendant, without consideration, and with directions to sell the land and pay plaintiffs' ancestor one-third of the moneys due Wood, that defendant had long been in possession receiving the rents and profits, which exceeded the interest on the mortgage

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indebtedness and his outgoes for taxes and the like, prayed an account of the profits of the lands, and that they be permitted to pay defendant the balance of the mortgage indebtedness, and have title to the premises vested in them, *Held* to disclose an offer to pay defendant whatever should be found due him upon the account. (407)

4. APPEAL AND ERROR. *Harmless Error.* Error in refusing to strike out immaterial matter, not prejudicial to the moving party, is harmless. (408)

5. STATUTES. *Foreign*, have no effect upon transactions relating solely to lands situate in Colorado. (408)

6. MORTGAGE. *Deed Absolute for Securing Money*, is a mortgage. The grantee has a lien, but no estate. (408)

7. ——*Surrender of Possession by Mortgagor*, to mortgagee does not of itself, extinguish the mortgagor's estate, or the mortgage debt. (408)

8. LIMITATIONS. *Color of Title—Good Faith.* One asserting a false claim of title under an absolute deed, in fact given as security, will not be heard to plead the seven years' statute of limitations (Rev. Stat. Sec. 4089, 4090). (408, 410)

9. EQUITY. *Laches.* Lands were held by title absolute, but in fact as security for money. Possession was delivered to the mortgagee, and for many years he received the rents and profits, not as his own, but for the mortgagor. The mortgage debt was never denied. *Held* that the mere lapse of time, the relations continuing, and being admitted, affected the rights of neither party. (409)

10. MORTGAGE. *Deed Absolute, as Security.* Hall exchanged lands in Colorado with Elston, for properties in Missouri, which were encumbered to Wood; and at Elston's instance, Wood consenting, the lands in Colorado were conveyed to Wood, who thereupon executed a lease to Elston, with a covenant to convey, upon the payment of the moneys owing by Elston. *Held*, in effect, a mortgage of the lands in Colorado by Elston to Wood. (414, 415)

11. ——*Absolute Deed*, with or without a contemporaneous agreement of sale, is presumed to be, in fact, what it appears to be. He who asserts that it was intended as a mortgage must show by clear and convincing evidence that this was the intention. (416)

12. APPEAL AND ERROR. *Presumptions.* In the court of review the presumption, in the first instance, is, that the decree of the court below is correct. (413)

13. ——*A Decree Fairly Supported by the Evidence*, and in har-

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mony with a true conception of the law, should not be disturbed, even though the court of review might have reached a different conclusion. (412, 413)

14. PLEADINGS. *Amendments.* Complaint seeking to charge certain lands with a trust. It appearing that the defendant had exchanged portions of the lands for others, receiving boot money, *Held* proper to allow an amendment praying the imposition of the trust upon the lands received in the exchange, and that defendants account for the moneys received in the exchange. (417)

15. TRUSTS. *Following Trust Property.* Equity permits the beneficiary to follow the trust property into new investments. (417)

16. MORTGAGE. *Assignment.* Wood, holding the legal title to lands as security for money, conveyed them, without consideration, to Hawkins, instructing him to collect the mortgage indebtedness by sale of the land, compensate himself for his trouble, and pay one-third of the residue of the mortgage money to each of persons named. *Held* an assignment of the mortgage debt. (418)

17. APPEAL AND ERROR. *Judgment.* Wood holding title to lands by absolute deed intended as a security for money, conveyed to Hawkins, without consideration, and with directions to collect the moneys due, by sale of the lands, and distribute the moneys, paying one-third to Elston. In an action by the heirs of Elston to enforce the trust under which Hawkins had received the title, the court below decreed in favor of plaintiffs, but failed to find the amount of the mortgage debt, or whether the transaction by which Hawkins received the title constituted a gift to Elston. The decree was reversed with directions to the court below to find as to the alleged gift, ascertain the amount due on the mortgage, and enter a decree vesting the title in plaintiffs, upon payment within a reasonable time of the amount found due, with interest from the date of entry, and to allow defendant to amend his pleadings so as to pray foreclosure, in default of payment of the mortgage debt. (418, 419)

18. ——*Costs.* Inasmuch as the plaintiffs stood in the attitude of a mortgage debtor seeking, redemption, but the greater amount of the costs had been occasioned by the wrongful conduct of the defendant, it was directed that neither party should recover costs, in the court of first instance, or the court of review. (419)

19. PARTIES. *Heirs Suing Upon Gift to Ancestor.* Wood held title to lands as security for money owing him by Elston, and conveyed the lands to Hawkins, without consideration, and with directions to collect the amount due him, by sale of the lands and pay one-third thereof to Elston. Hawkins still holding the title Wood died and his estate was settled. Elston's heirs were allowed to maintain an action upon this transaction, in their own names.

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Error to Las Animas District Court.—Hon. HENRY HUNTER, Judge.

Messrs. McGLASHAN & GOW, for plaintiff in error.

Mr. JOHN G. PAXTON, Messrs. McCHESNEY & McCHESNEY and Messrs. NORTHCUTT & McHENDRIE, for defendants in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

The questions here involved grow out of transactions among members of the same family. John W. Elston, under whom the defendants in error claim by inheritance, and Canby Hawkins, the plaintiff in error, who was sole defendant in the trial court, were half brothers, having the same mother. John W. Wood was their step-father, and participated in the raising of both. After his wife's death he made his home, first, with one and then another of his step-children, with whom the most intimate family relations existed. Other allegations of the complaint are that Elston, in 1894, being the owner of certain real estate in Kansas City, Missouri, some of which stood upon the records in the name of Wood, to secure him for a loan, negotiated a trade thereof to one Hall for a ranch situated in Las Animas County, in this state. In consummating the deal, by mutual agreement between Wood and Elston, $11,000 of the indebtedness which Elston owed Wood, secured by the Kansas City property, was transferred to the Colorado ranch. This was consummated by rearranging some of the loans on the Kansas City property, the conveyance of the latter to Elston, and by him and his wife to Hall, subject to the readjusted loans aforesaid, and the joint conveyance, free of incumbrance, by Wood,

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Elston and his wife to Hall of other of such property held by Wood as security as aforesaid; and the conveyance by Hall by deed, absolute in form, of the ranch to Wood to secure him in the payment of the $11,000 loan; and in conformity with a custom he had adopted and followed for many years in loaning money, when taking title absolute in himself, but, in fact as security, Wood, as a part of the same transaction, gave Elston a lease covering the ranch, stipulated therein that the lessee should pay the taxes, special assessments, and for repairs and improvements on the ranch, and a certain annual rental, which, in the case at bar, was equivalent to six per cent. interest on the loan, and containing a clause that the grantor would convey the premises to the lessee within the term of the lease upon payment of the $11,000. It is further alleged that Elston thereupon took personal charge of the ranch; that he was a practicing physician, inexperienced in ranching, and was unfortunate in such business venture, and defaulted in the payment of interest and taxes; that thereupon Wood sent Hawkins, who was an experienced farmer and business man, to the ranch to investigate and ascertain the cause of Elston's financial embarrassment; that in the year 1897, Wood, being old and in feeble health, upon the representation of Hawkins, that in order to manage the ranch successfully he should have the power of sale necessary to dispose of the same and collect the amount of the loan, conveyed, by quit-claim deed, the ranch to Hawkins for an alleged consideration of $1.00, but in fact, without any consideration whatever, with full knowledge on the part of Hawkins of the rights and equities of Elston in the premises; that simultaneously with the execution and delivery of such conveyance to Hawkins, Wood instructed him to collect the amount of the mortgage indebtedness by the sale of the ranch, and, after compensating himself for

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his services, to pay one-third thereof to the defendants in error herein, one-third to a brother of John Elston, and one-third to Wood. That thereafter Hawkins assisted Elston in the management of the ranch until the latter's death in October, 1900, and subsequent thereto has had the sole management thereof; that in January, 1908, Hawkins repudiated the trust and denied the rights of plaintiffs in the premises; that Wood died in September, 1905, and his estate has been duly administered and final settlement made; that the rental of said ranch, since the conveyance to Hawkins, has exceeded the interest on the loan and the charges, taxes and assessments on the ranch.

The prayer of the complaint is, substantially, that the sum Hawkins was instructed to pay the plaintiffs upon the collection of the mortgage indebtedness be decreed a credit thereon; that Hawkins account for the profits of the ranch, and the plaintiffs be permitted to pay to Hawkins the balance of the mortgage indebtedness, and have title to the premises vested in them.

The defendant, after unsuccessfully attacking the complaint by demurrer and motion to strike, filed an answer in which he denied the existence of the mortgage loan, and the facts as to the gift aforesaid; alleged an absolute conveyance of the ranch for value from Hall to Wood, and from the latter, by gift, to himself, without notice of the rights of plaintiffs. There was also interposed as defenses the statute of frauds of Missouri, and those of limitation of this state, the laches and estoppel of the plaintiffs, and the voluntary surrender of the premises by Elston, together with the payment by defendant of taxes for seven successive years under possession, and color of title and claim of ownership made in good faith. An alleged debt of Elston to Hawkins was pleaded as a counter-claim to which a demurrer was in-

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terposed and sustained. The answer and evidence having disclosed that Hawkins in 1903 sold and exchanged for other lands and a certain cash payment, to an innocent purchaser, small portions of the ranch in question, and it appearing that such lands so received by the said Hawkins were held by him and adjoined the balance of said estate, and, as enclosed, constituted a part thereof, the plaintiffs were permitted to, and did, amend their complaint to impress their equities thereon, and for judgment against the defendant for the cash payment he had received in such exchange, with interest. Trial was had and the issues found in favor of the plaintiffs. The decree cancelled and annulled the deed from Wood to Hawkins, which had been asked in the prayer of the amendment to the complaint, and adjudged the plaintiffs owners in fee of the ranch, including that received in exchange as aforesaid, subject, however, to whatever might appear to be due on the aforesaid loan, (without finding the amount), and gave judgment for plaintiffs for the cash received by defendant on the exchange of lands aforesaid.

1.—The overruling of the demurrer to the complaint and the denying of the motion to strike portions thereof, and the sustaining of the demurrer to the cross-complaint, were not prejudicial to the defendant. (a)—The demurrer to the complaint, though purporting to set forth five grounds, was, by its omission of essential specifications required by the Code in that regard, in legal effect, only a general demurrer upon the ground of insufficiency of facts stated to constitute a cause of action. While we do not commend the complaint as a model of good pleading, nevertheless, as against a general demurrer, we think it sufficient. The pleading of an actual tender or offer to pay the amount due under the mortgage would probably not be a condition precedent

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to the maintenance of plaintiff's cause of action under the facts of this case. The complaint alleged that defendant had repudiated the trust and was claiming the ownership and right to possession of the property worth $25,000, held only as security for the payment of less than half that sum. It thereby, coupled with its other allegations, clearly set forth sufficient facts to impel the court to construe the contract, and declare the true relation of the parties in the premises.—*Reitz v. Humphreys,* 53 Colo. 177, 184, 185, 125 Pac. 518. However, we think the complaint, when fairly considered, discloses an offer on the part of plaintiffs to pay the mortgage indebtedness when the amount thereof should be ascertained and determined. It contains facts showing the existence of the debt from Elston to Wood, the furnishing by the former of the sole consideration for the ranch, its conveyance to Wood by deed absolute in form, and the giving of the lease as a part of the transaction in accordance with a plan mutually agreed upon between Wood and Elston to secure the debt aforesaid, and to reinvest Elston with title to the ranch upon payment of the debt, and prayed that such matters be so determined and decreed and plaintiffs be permitted to redeem the ranch from the mortgage lien and have title thereto invested in themselves. (b)—Defendant's motion to strike portions of the complaint should, perhaps, have been sustained as to the matters designated therein under the heading "First" and "Second." The former sought to eliminate certain allegations as to the personal characteristics of Wood, his aversion to the payment of taxes, his business and custom as a money lender in making and securing loans: while the latter sought to eliminate the conclusion that by virtue of certain things a resulting trust arose. However, the question need not be determined herein. For, under the circumstances of this

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case, as disclosed by the record, no possible injury resulted to the defendant by the action of the court in the premises. (c)—The demurrer to the cross-complaint was properly sustained. The alleged cause of action was a debt of Elston's to Hawkins arising from a transaction in no wise connected with the mortgage indebtedness or the land in question, nor had it been proved and established as a valid claim against Elston's estate as required by statute.

2.—The statute of Missouri pleaded as a defense has no application. The facts of the case must be considered in the light of the laws of this state, and the rights of the parties in and to the premises determined thereunder. Neither do the statutes of limitation of this state, nor the alleged laches and estoppel of plaintiffs, affect their rights or prevent them from maintaining this suit. A deed, although absolute on its face when given as security only, is a mortgage, and the mortgagee therein has a lien on, but no estate in, the premises. As defendant stands in the shoes of Wood, with no rights except by way of gift, and taking with actual and full knowledge of the existence of the mortgage and the rights of the mortgagor in the premises, the case is in principle the same as if Wood were living and the sole defendant herein. Moreover, under such facts, possession and payment of taxes for seven successive years can avail defendant nothing. If the instrument of conveyance under which he holds constitutes color of title, nevertheless, claim of ownership could in no wise be made in good faith. The birthmark of a mortgage—the existence of a debt—was impressed upon the transaction at the time of its inception, and even the surrender of the possession by the mortgagor to the mortgagee, before or after the debt became due, does not of itself alone convey the mortgagor's estate in the land or extinguish the debt

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and security. They continue as before, and while time may extinguish the right to collect the debt at law, the debt and lien, nevertheless, exist. But here the lapse of time had in no wise affected the rights of either party. The remedy of each was reciprocal, and under the circumstances of this case equity affords a remedy to all of the parties concerned. There had been no denial of the debt by plaintiffs or by their predecessor in interest, the original debtor. On the contrary, the existence of the debt was at all times conceded, payment thereof contemplated, and the rents and profits of the premises received by the mortgagee under an arrangement fairly deducible from the evidence that it should be received by him, not as his own, but as that of the mortgagor. Prior to the quit-claim deed from Wood to Hawkins the latter talked with plaintiff, Sallie G. Elston, relative to the delay of her husband in sending "the interest on the $11,000 owed by" him to Mr. Wood. And thereafter, immediately subsequent to the death of Elston, Hawkins talked with Mrs. Elston about her equity in the ranch, at which time she told him that she had "her hands full with the children, and would leave the matter of working" her equity out in his hands, which was clearly understood should be accomplished through a sale of the premises. Indeed, in the same conversation Hawkins stated that he had tried to sell the ranch, and that Mrs. Elston's husband "had been advertising the ranch all the time up to his death in Denver, Chicago, Kansas City and Trinidad papers." This arrangement continued without question or suggestion of repudiation by either of the parties until the spring of 1908, a short time before the institution of this suit. Indeed, under date of February 14, 1908, Hawkins, in his letters in evidence, substantially concedes this fact. In one he said: "I don't think any one could take it (the ranch), with

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$11,000 on it and pay it out." Therein he also refers to his efforts to sell the ranch and suggests that Mrs. Elston sell it, or that she buy out his interest therein, or, if she would set a price on her interest, "give or take," the two could "trade." As long as such relations and understanding existed between the parties, no cause of action accrued, and the statutes of limitation neither barred a foreclosure nor a redemption from the mortgage deed.

While the surrender of possession of the premises by a mortgagor to a mortgagee where the mortgage was created by deed absolute in form, may frequently be an important factor in determining whether the equity of redemption has been given up by the mortgagor, we think little significance is to be ascribed to such act under the facts in this case. It is conceded that both Wood and defendant became convinced that the ranch was worth less than the $11,000 against it, and had frequently so advised both Elston and his wife. All parties recognized and conceded Hawkins' superior business ability, and it was believed that he could handle the ranch and dispose of it to better advantage than could Elston. Moreover, it is a legitimate deduction that it was within Elston's knowledge, as it certainly was that of the others, that Wood, believing that the ranch was worth no more than the encumbrance thereon, had set aside or attempted so to do by gift, one-third of such encumbrance for the benefit of the plaintiffs herein when the same was collected by a sale of the premises: While Elston thought the ranch far more valuable than did either Wood or Hawkins, he was, nevertheless, anxious to sell it, pay the indebtedness and receive his equity, whatever it might be. Under these circumstances, it is clear there was no intention upon Elston's part to abandon or disclaim his right to redeem, but rather to facilitate his own interests by a hoped-for quick sale through Hawkins, and the sur-

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render of possession of the premises was for no other purpose and was so understood by all the parties. Otherwise, why did Elston thereafter continue in his endeavor to sell the ranch? Nor do we think the reference by Mrs. Elston, in a letter to Hawkins, to the "third value of the ranch," which she therein stated Wood provided in his agreement should be hers, coupled with the request that Hawkins presently advance the same to her, constitutes an admission, as claimed by defendant, that she had no rights in the premises as a mortgagor. This is clear from other portions of the same letter. She therein states that "I am asking only for that which is doubly my own, both by right of the property which my husband put into the ranch, and by the expressed will of him who owned the incumbrance upon it, and who put it into your hands as a trust to wind up and distribute." Indeed, we think referring to her interest in the ranch as one-third of the value thereof when seeking to secure it as she was from Hawkins before sale of the ranch, was quite natural and in no wise inconsistent with her position herein. She knew that her husband, up to the time of his death, had endeavored to sell the ranch, that Hawkins had exerted his efforts continuously to the same end and had long entertained, as did Wood, the belief that the ranch was worth no more than the incumbrance thereon; and, having in mind the gift or attempted gift to her by Wood of one-third of the mortgage indebtedness, whatever it might be when collected, she finally concluded, hard pressed as her letter discloses she was to support herself and children, to close the matter and presently possess the gift. Had Hawkins accepted her suggestion and turned over to her the alleged gift, an entirely different question would have arisen than that involved herein. But this he did not do and what she said in that letter is in no wise controlling in view of the other facts of the case.

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3.—The lease to Elston was executed a few days after the date of the deed to Wood, and it is therefrom contended that the transaction constituted a conditional sale, and can not be shown to be, in fact, a mortgage. We think otherwise. The dates of the delivery of the several instruments are not disclosed but it does appear that the conveyance of the ranch from Hall to Wood and the making of the lease from Wood to Elston were part and parcel of one transaction only and were, in legal effect, and were so intended to be, a mortgage executed by Elston to secure the payment to Wood of a certain definite indebtedness.—*Borcherdt v. Favor,* 16 Colo. App. 410. And, contrary to defendant's contention, it makes no difference that the grantee in the lease was not the same as the grantor in the deed. As said in *Borcherdt v. Favor, supra;* "In law the defeasance must be in favor of the grantor in the deed. In equity the rule is different, and the transaction may be held a mortgage even though the defeasance be to one other than the grantor." It is well established that an instrument or instruments executed simply as security can not be converted into a conditional sale by the form of a conveyance to reconvey. If a transaction resolve itself into a security, whatever may be its form and whatever name the parties may choose to give it, it is in effect a mortgage.—*Flagg v. Mann,* 2 Sum. 486, 533, Fed. Cas. No. 4847.

4.—The defendant questions the sufficiency of the evidence to establish plaintiffs' case. He attacks it as to the existence of the indebtedness upon the Kansas City property, the mortgage upon the ranch and his knowledge thereof. These matters were found in favor of the plaintiffs, and if there is a fair *quantum* of admissible and proper evidence to support such conclusions we must presume them to be correct. The law in this regard is stated in *Davis v. Pursel,* 55 Colo. 287, 291, 292, 134 Pac. 107, 108, 109, as follows:

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"In this character of cases an appellate tribunal may examine the evidence to ascertain if the trial court had the right conception of the law, if its conclusions are supported by the evidence, or are fair deductions therefrom; and, if upon the whole case, it is reasonably certain that the decree is palpably unwarranted, though it may be slightly supported by the evidence, it should, nevertheless, be set aside. On the other hand, however, if the decree is supported by the evidence, under a proper conception of the law, it should not be disturbed, though the reviewing tribunal might have, if passing upon the matter in the first instance, reached a different conclusion. * * *

In equity the judgment is essentially a deduction as to what is just and true from the facts and circumstances proven in each particular case. It is, therefore, a question for the trial court as to the convincing effect of the evidence. When that tribunal enters a decree, and there is a fair *quantum* of admissible and proper evidence to support its conclusions, we must presume that it was governed by proper rules of law, unless the contrary appears, and that its findings are correct. This applies as well to those questions in a case which must be established by clear and convincing proof, beyond a reasonable doubt, as to those which may be established by a mere preponderance of the evidence. The principle of testing the weight of the evidence is no different upon one matter than upon another. In most trials presumptions arise at every step which have their effect, and are conclusive, unless overcome by proper evidence sufficient for that purpose. However, in almost every case of this character certain matters depend upon the existence or non-existence of extrinsic facts and circumstances resting in parol testimony. The establishment of those facts and circumstances to the satisfaction of the trial court,

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depend largely on the character of the witnesses, the consistency of their testimony and their manner and appearance on the witness stand. It is that court, not this, which must determine the credibility of the witnesses, pass upon the weight of their evidence and find the facts."

Measuring the sufficiency of the evidence by these well established rules, we are not justified in disturbing the findings of fact embodied in the decree. There was sufficient evidence to show that Elston owned equities in certain Kansas City property and was hard pressed to meet his obligations in that regard; that Wood proffered to assist him in his distress and proposed, in accordance with what he claimed was his plan of loaning money, to have the property conveyed to him as security for the loan, by deed absolute in form, which he denominated a deed for a bond, with the agreement on his part that if Elston should keep the interest on the loan and the taxes on the property paid and discharged, when the indebtedness was satisfied he would reconvey the property to Elston. This was agreed to by Elston and the loans on the Kansas city property readjusted through deeds, absolute in form, to Wood, and leases from Wood to Elston, in the form of those used relative to the Hall ranch; that thereafter Wood, at the solicitation of Elston who desired to trade his Kansas City property for the ranch in question, consented to transfer the indebtedness he held upon the former property to the latter, and evidence the obligation of Elston to him and the character of security held therefor by deed and lease in the same manner they were accustomed to use in such transactions, and the deal was consummated by means of the deed and lease here under consideration. That such was the relation of the parties is not denied, and circumstances strongly corroborate it. Wood told Kahl, a dis-

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interested witness, that it was Elston's property that was traded for the ranch, and while he told her the ranch was his, he also stated that he had given Elston a lease and contract, and the ranch would be Elston's "free and clear if he paid off this indebtedness" that Wood held against it; that Elston owed him $11,000 on the ranch, and that they had adopted that plan of security instead of a mortgage, because the mortgage would be taxable while under that plan it was not. Moreover, it was testified that the defendant frequently admitted before receiving the quitclaim deed to the ranch from Wood, that it was his understanding that the consideration to Hall for the ranch was a conveyance of Elston's property located in Kansas City, and that Wood had told him that he did not believe the ranch was worth the incumbrance. Indeed, in defendant's own testimony he stated that Elston had the privilege until his lease ran out to "pay the $11,000 and redeem it" (the ranch). The right of redemption usually implies the existence of a mortgage or pledge and was evidently so used by defendant. Again, defendant told one Smith, a disinterested witness, in Trinidad, prior to the time of the deed from Wood to him that Elston owed Wood and him about $11,000 and wasn't doing any good with the ranch and hadn't paid the interest nor the taxes. Though testifying as a witness defendant in no wise denied these conversations and admissions. It was shown that defendant said "he didn't think there was any equity in the property over and above the mortgage," and that if Elston would only answer the letters which Wood wrote him asking if he had kept the taxes paid and why he didn't send the interest on the $11,000, Wood would be easy with Elston, and let the matter stand and assist him further. Defendant likewise informed Mrs. Elston, almost immediately after the death of Wood, that he

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wanted her to know that she had the privilege which Elston always had of selling the ranch and getting the equity. And in a letter expressed his belief that no one could take the ranch with $11,000 on it and pay it out. That a mortgage existed on the ranch and Hawkins had full knowledge thereof is further evidenced by his uncontradicted conversations detailed in evidence and by his letter to Mrs. Elston wherein he declines, as he says, to show his hand until the full settlement of Wood's estate.

Notwithstanding the earnest criticism by defendant's counsel of the law as declared in *Davis v. Pursel, supra,* we are satisfied therewith and believe it perfectly consistent with the law as declared by other decisions of this court reviewed or cited therein, and claimed by counsel to be inconsistent therewith. It is quite true that where there is a deed absolute in form, either with or without a contemporaneous agreement for a re-sale of the property, there being nothing upon the face of the collateral papers to show a contrary intention, the presumption, in the first instance, independent of evidence, is, that the transaction is what it appears to be, and he who asserts that the writings constitute in fact a mortgage must show by clear and convincing evidence that such was the intention of the parties. In other words, the court, in the first instance, must presume that the writings speak the truth until the contrary is shown by clear, certain, unequivocal and trustworthy evidence such as to establish the fact beyond any substantial doubt. However, when a decree of the trial court establishes such fact the presumption, in the first instance, by the reviewing tribunal must be that the decree is correct. If upon consideration of all the evidence in the record the reviewing tribunal can say, within its judicial discretion, that the specific character and quality of evidence essential to transform a deed, absolute on its face, into a

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mortgage, is lacking, the presumption in favor of the correctness of the decree of the trial court is overthrown and the presumption that the deed and writings express the true contract between the parties, is restored. This is the principle recognized and applied relative to sustaining or setting aside verdicts of conviction in criminal cases, and declared in *Davis v. Pursel, supra.* In a criminal case where there is a fair *quantum* of evidence, though it be conflicting, to warrant fairminded men to deduce therefrom the guilt of a defendant, a verdict of guilty therein will not be disturbed by a reviewing tribunal though, if passing upon the matter in the first instance, it might have reached a different conclusion. So in cases of the character here under consideration, as declared in *Davis v. Pursel, supra,* if upon the whole case it appears that the decree is palpably unwarranted, though it may be slightly supported by the evidence, it should be set aside. But, if the decree is supported by a fair *quantum* of the evidence, under a proper conception of the law, it should not be disturbed though the reviewing tribunal might have, if passing upon the matter in the first instance, reached a different conclusion. The facts underlying the verdict in the one case, or the decree in the other, under the conditions supposed, are established within the meaning of the law beyond a reasonable doubt.

5.—It was proper to permit the plaintiffs to amend their complaint and impress their equities upon the lands received by Hawkins in exchange for portions of the estate belonging to Elston, and to require defendant to account for the money received in the transaction. The latter, however, should be applied as a credit upon the mortgage indebtedness as of the date of its reception by defendant. Equity permits a beneficiary to follow the trust property into new investments and molds and ap-

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plies its plastic remedies to meet the conditions in each case. As it can not restore the particular thing held in trust it compels defendant to restore that which stands in his hands in lieu thereof.

6. We approve the findings of the court in favor of the plaintiffs upon the material issues involved; and the judgment that plaintiffs are the owners in fee of the ranch in dispute, subject to whatever may be due by virtue of the Wood mortgage, is hereby affirmed, while that portion, adjudging the quit-claim deed from Wood to Hawkins null and void and of no effect, is disapproved. Clearly such deed constituted an assignment of the mortgage indebtedness held by Wood and invested in Hawkins the right in the premises to collect the debt previously held by Wood. The fact, that the transaction was without consideration, coupled, if it were, with directions as to the disposition of the mortgage founds, when collected, in no wise affects the matter. If this were the only difficulty in the judgment we would correct it here and end the controversy. The truth is, however, that notwithstanding specific findings of fact in favor of plaintiffs, as well as a general finding, it is clear the court did not determine whether the facts alleged and proven, when tested by the law applicable thereto, constituted a gift to the plaintiffs by Wood of one-third of the mortgage indebtedness when collected. This is disclosed by the failure to find the amount due upon the mortgage, which of course would be substantially reduced by such gift if legally established. Without expressing an opinion upon the merits of the alleged gift, or the law applicable thereto, we reverse the judgment, except in so far as it is hereinbefore approved, with directions that the court determine the matter as to the alleged gifts, ascertain the amount due under the mortgage, and thereupon enter a decree vesting title in fee of the premises

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in plaintiffs upon payment, within a reasonable time to be fixed by the court, of the sum so found due, with interest, from the date of entry. And, if the defendant is so advised, he may amend his pleadings and have judgment of foreclosure of the mortgage, and an order of sale of the premises to satisfy the same, unless plaintiffs redeem within the time prescribed. While it may be a general rule that the party seeking to redeem is charged with the cost of such proceeding, by far the greater portion of the costs in this case would not have accrued had it not been for the wrongful acts of the defendant in the premises. Therefore, we think it inequitable that either of the parties should recover costs of the other in either court, and it is so ordered. The decision in this case was originally by a Department of the Court, but at the earnest request of the defendant, embodied in his brief upon rehearing, the entire court has considered the case, modified the opinion slightly, and denied the petition for rehearing. The former opinion is, therefore, withdrawn, the judgment affirmed in part and reversed in part, as hereinbefore stated, and the cause remanded for further proceedings in accordance with the views herein expressed.

Judgment affirmed in part and reversed in part.

Decision *en banc.*

Decided October 4, A. D. 1914. Rehearing denied February 1, A. D. 1915.

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[No. 7531]

BROWN v. GIBSON.

TAX TITLE. *Deed Substantially in Statutory Form*, is not void upon its face.—*Imperial Securities Co. v. Morris, ante* followed.

Appeal from Logan District Court.—Hon. H. P. BURKE, Judge.

Messrs. ALLEN & WEBSTER, for appellant.

Mr. JOHN F. MAIL, for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The controversy is over a quarter section of land in Logan County. Charles E. Gibson, appellee here, brought suit in ejectment, against G. C. Brown, appellant here, alleging ownership of and right of possession to the property, and the wrongful withholding of the possession by Brown. For answer, the latter denied all allegations of the complaint, and set up affirmatively that he was the owner in fee and entitled to the possession of the premises, relying upon a tax deed to establish title. A replication put in issue all new matter of the answer. The court rendered judgment for Gibson on March 13, 1911, finding that he was the owner of the property and entitled to immediate possession; that Brown had no right, title or interest therein; and that the tax deed upon which the latter relied to establish title was void upon its face. The court further found that Brown had paid in taxes the sum of $190.00, which he was entitled to have refunded. Brown brings the case here for review.

Only one proposition need be considered, since our view thereon necessitates a reversal of the judgment.

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The tax deed under which Brown claims was held void by the lower court, not because of matters outside the deed, but because of matters appearing on the face thereof. In *Bryant v. Miller,* 48 Colo. 192, 109 Pac. 959, a deed like the one under consideration was held void, but in an opinion recently announced, *Imperial Securities Co. v. Morris,* 141 Pac. 1160, this court, after full and deliberate consideration, overruled *Bryant v. Miller, supra,* on this point, and held a deed, substantially in the form of the one now before us, fair on its face and valid. Upon the authority of this recent holding the judgment herein should be reversed and the cause remanded for a new trial, and it is so ordered.

Judgment reversed.

MR. JUSTICE GABBERT and MR. JUSTICE HILL concur.

[No. 7842]

GRIMES ET AL. ADMINISTRATORS, v. BARNDOLLAR.

1. EVIDENCE. *Competency.* Evidence relevant to any phase of the issues, is admissible. (424)

2. GIFT INTER VIVOS. *Of Corporate Stock,* does not require endorsement of the certificate in order to its validity. (429)

3. ——*Evidence. Oral declarations, e. g.* "I have given all my stocks," to a party named, justifies the conclusion that the donee is entitled to all corporate stocks owned by the donor at the time of the declaration. (430)

4. ADMINISTRATOR. *Liability.* Corporate stocks were delivered, under protest, to administrators, by one in possession of, and claiming them by gift of the decedent, and were by them inventoried, and a

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portion thereof afterwards sold under order of the County Court. The administrators acted throughout in good faith, under the advice of the County Judge, and with the knowledge of plaintiff. They made no personal gain in the transaction. *Held* they were not personally liable for the value. (430)

5. INTERVENTION. *Effect—Pleading Thereto.* Action against administrators, personally, for the value of certain corporate stock. They intervened in their representative capacity. The heirs also intervened, praying that the stock be decreed to them. *Held* that plaintiff was entitled to answer the intervention petitions precisely as if the same matter had been presented in an original complaint, even although this presented equitable questions; that this was expressly allowed by Sec. 23 of the Revised Code; and that the action should proceed to a final decree upon the issues made by the petitions, and plaintiff's cross-complaint thereto. (437, 438)

6. SPECIFIC PERFORMANCE. *Contract—Certainty — Consideration.* The plaintiff claiming certain corporate stocks against the heirs and personal representatives of one Hall, relied upon a clause in an agreement between the heirs of Hall, which provided among other things that "the stocks and shares inventoried as belonging" to plaintiff, "shall be considered her property, and the certificate shall be delivered to her." Considering that the shares in question had at the decease of Hall been in possession of plaintiff, and had been by her delivered to the administrators, on their demand, but under protest and without waiver of any right, and had been inventoried with a statement of her claim and protest; that the agreement in question had for its purpose the adjustment of an action then pending between the heirs, involving the whole estate; that it resulted in the settlement of that controversy, and the disposition of the entire estate except the shares in question; that the heirs were represented by counsel who it was reasonable to assume were fully informed as to the details of plaintiff's claim; and that there were no other stock in dispute, it was *held* that the agreement was not objectionable for uncertainty, and that the mutual covenants of the heirs was a sufficient consideration, moving to each. (433, 435)

7. ——*Contract Between Third Persons.* In the same case. *Held* that the circumstance that plaintiff was not a party to the agreement upon which she relied was no obstacle to its specific performance on her behalf. (436)

8. ESTOPPEL. *By Conduct.* An action asserting title to the entire estate of a deceased person does not estop the plaintiff from afterwards asserting a just claim to a portion thereof. (439)

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9. DAMAGES. *Conversion of Corporate Stock—Of what Date to be Valued.* Administrators had demanded corporate stock from one who was entitled thereto by gift of their intestate. She delivered them under protest, and the administrators received the same in their representative capacity and disposed of a portion thereof, applying the proceeds to the purposes of the estate. *Held* that the stock should be valued as of the date of the administrators refusal to surrender them on plaintiff's demand, with an addition for any dividends paid thereon, after the date of a certain agreement by which plaintiff's right to the stock was conceded by the heirs, and the date of her demand therefor, with interest upon the entire amount from the date of the demand. (441)

10. TROVER. *Date of Conversion.* Corporate stocks held converted at the date when demand of one entitled to immediate possession is refused. (442)

11. MANDATE. *Containing erroneous directions,* recalled upon petition filed at the same term, specifying the error. (443)

Error to El Paso District Court.—Hon. JAMES OWEN, Judge.

Mr. CHARLES S. THOMAS, Mr. WILLIAM H. BRYANT, Mr. GEORGE L. NYE, Mr. WILLIAM MALBURN, for plaintiffs in error.

Mr. SAMUEL H. KINSLEY and Mr. JOHN A. CARRUTHERS, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

The basis of this contention is the ownership of stocks in sundry mining companies, which stood upon the books of the companies in the name of Harry Hall, at the time of his death. Trial was to the court, which found that Hall gave, transferred and delivered to the plaintiff (the defendant in error here) all stocks described in her complaint, the certificates for which had been endorsed by him; that the transaction constituted a gift *inter vivos,* but found against her as to the stocks,

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the certificates for which had not been endorsed. The court also found, that a portion of an agreement in writing between the other claimants to the Hall estate, which, it is alleged, provides that the plaintiff should have all of these stocks, was not capable of specific enforcement, because too ambiguous and uncertain. The defendants and intervenors bring the case here. The plaintiff has assigned cross errors upon the theory that she was entitled to all the stocks under her claim of a gift *inter vivos:* also by virtue of the agreement between the other parties interested. Many errors are assigned. As the trial was to the court, those made by the defendants pertaining to evidence are not sufficient to justify a reversal. Its substance is material and responsive to some phase of the various contentions put in issue by the pleadings.

The main issue made by the first pleading is, who was the owner of these stocks at the time of Mr. Hall's death, which occurred very suddenly on January 29, 1909. The record discloses, that for about fourteen years prior thereto, the plaintiff Minnie Barndollar, lived at his residence and acted as housekeeper (she was probably there prior to the death of Mrs. Hall, which occurred in 1896); that Hall left an estate valued at about $170,000 of which $117,000 was in real estate; that in the fall of 1903 Hall and Miss Barndollar were starting on a strip to California when she placed, what purported to be, certain stocks in charge of Mr. and Mrs. Jones, then residing in the house with them; that the stocks were in a tin box, the contents of which the Joneses did not see, but were informed by Miss Barndollar, in the presence of Hall, that the box contained stocks belonging to her and that in case of fire these stocks should be saved, as they were all she had; that Hall, while hearing it, did not dispute this assertion, but joined in the conversation, and among other things said 'Yes, for goodness sake save the stocks,

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that they were hers and they were all she had'; that in May, 1905 when Hall was leaving for England he called the Joneses, who were still living in his house, to witness an agreement between Miss Barndollar and him, saying that he wanted to make this gift of stocks that Minnie held legal; that the stocks he was then giving her were valued at about $30,000; that during this conversation he presented a paper in his handwriting signed by himself and Miss Barndollar requesting the Joneses to witness it. It reads:

"COLORADO SPRINGS, COLO.,
May 1st, 1905.

This agreement entered into by H. Hall, of the 1st part and Minnie Barndollar, of the 2nd part, this 1st day of May, 1905, to-wit: The said Hall, in consideration of services rendered by Minnie Barndollar, has endorsed and left with Minnie Barndollar certain mining stock certificates, and in case of his death the said mining stock certificates are to become the property of Minnie Barndollar, and in the meantime if the stock should enhance in value, and she should decide that it would be advantageous to dispose of some of them, she is at liberty to do so, and the proceeds, in case of my death, are to belong to Minnie Barndollar, and that it is my desire that all courts of law and equity so construe the above that the same shall in no case for want of legal form or otherwise be construed as that my relatives or any other person should possess or enjoy the above except and in the manner and for the uses hereinabove specified without any mental reservation or purpose of evasion.

Witness our hand and seal this 1st day of May, 1905.

Witness
Rose Jones H. Hall, (Seal)
W. C. Jones Minnie Barndollar (Seal.)
(Made in duplicate)"

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Another instrument in the hand writing of Mr. Hall, dated June 6, 1908, signed by himself and Minnie Barndollar, is in the record; it reads:

"COLORADO SPRINGS, COLO.

This agreement entered into by H. Hall of the 1st part, and Minnie Barndollar of the 2nd part, this 6th day of June, 1908, to-wit: The said H. Hall in consideration of services rendered by Minnie Barndollar, has endorsed and left with Minnie Barndollar certain mining stock certificates, and in case of his death the said mining stock certificates are to become the property of Minnie Barndollar to do with as she thinks proper, and the proceeds, in case of my death, are to belong to Minnie Barndollar, and that it is my desire that all courts of law and equity so construe the above that the same shall in no case for want of legal form or otherwise, be so construed as that my relatives or any other person should or shall possess or enjoy the above, except and in the manner, and for the use hereinabove specified, without any mental reservation or purpose of evasion.

Witness our hand and seal this 6th day of June, 1908.

Witness

H. Hall (Seal.)

Minnie Barndollar (Seal.)"

Jones testified to a conversation with Hall about a week or ten days before his death, on the street, in which Mr. Hall said, "Do you know what I think I will do? * * * I believe I will put this lot in Miss Minnie's and Laura's name; * * * I believe you ought to look after your friends first, * * * You know I have given all my stocks to Miss Minnie;" that they then talked about what could be done on the other end of the lot in the way of cheap buildings for rent, etc. The witness further states, that the stocks were discussed a great deal by

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Hall and Miss Barndollar; that he has heard Hall ask her to go up and get the stocks, and things like that, not once but a dozen times; that he had repeatedly seen them go over the stocks on the table, and discuss them in general conversation.

Mrs. Jones testified, that ostensibly Miss Barndollar occupied the relation of housekeeper, and was supposed to be paid for her services; that she did the washing and mending, tending to all those things. Witness further testified, that in the fall of 1907 she saw Miss Barndollar in the dining room in tears; that Hall asked the witness what the matter was; that she stated Miss Barndollar was dissatisfied with the arrangements about stocks; that it worried her; that the value of the stocks fluctuated, and inasmuch as he had this property in her name at one time, and it suits her better and satisfies her, why not do the same thing again; that he said she ought to be satisfied with them; that they would always represent about $30,000, and then if she did not have these stocks he had taken care of her in another way, which he did not tell the witness about; that later she told the plaintiff what he said.

Jones testified, that the first he saw of the stocks after Mr. Hall's death was the evening thereafter; that it was in the plaintiff's room at the Hall residence; that he went over the stocks to see what she had; that he next saw them after he and Mr. Grimes had been appointed administrators to collect, which was two or three days thereafter that the stocks were in a box which she brought down and unlocked; that they took them out of the box, making a list of them later that day; that all stocks referred to in the inventory as having been received from her were actually received from her, except 6,000 shares of Isabella, which Mr. Grimes testified were taken from the desk in the library or somewhere in the

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house. Jones says, that after their appointment, Miss Barndollar was called upon to deliver the stocks; that she did so under protest, claiming them as her property by reason of the gift to her of them by Mr. Hall. Mr. Grimes testified, in substance, that after his first talk with Miss Barndollar, he discussed the advisability of taking the stocks, with the County Judge; that the judge advised him that they should take the stocks, making a record of any protest and claim Miss Barndollar might make, inventory them, and that the matter of her ownership would be settled afterwards; that after stating to her what the judge had suggested, she delivered the stocks to them under protest, claiming them as her property; that it had been previously stated to her that they would discuss the matter with the County Judge and get his suggestion; that she said she did not think any advantage would be taken of her, only she wanted to save whatever right she had; that if it was proper to turn them over she would deliver them; that the subject of turning them over had been discussed two or three times before there was an actual delivery; that he told her that they would list the stocks with the assets of the estate, making a record in the inventory of her claim, protest, etc., with the understanding that any right she might have in the property would be protected, and would not be lost by reason of their being inventoried in the assets of the estate; that he thinks this was the County Judge's suggestion; that a part of the stocks were endorsed and a part were not; that she claimed all the stocks which she delivered, and that she was not represented by an attorney prior to the delivery; that they listed the stocks as a part of the assets of the estate, as being found and taken from the possession of Minnie Barndollar, the same being claimed by her as her property, etc.; that the delivery was made by her to them under protest and waiving no right by reason of said delivery.

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Further analysis of the evidence is unnecessary. For reasons hereafter stated, we will not pass upon the findings of the court in this respect, other than to say that a careful examination of the record satisfies us that there was competent evidence to sustain the ruling of the trial court in finding that there had been a gift *inter vivos* of the stock endorsed, as well as evidence which might have been sufficient, had the court so found, to sustain a gift *inter vivos* of the unendorsed stock. There is no evidence which makes a distinction as to the intention of the donee pertaining to the two classes of stock, other than the instruments above quoted, and the fact that part was endorsed and the remainder unendorsed, while the undisputed oral evidence is to the effect that the deceased intended to, and did, make a gift of it all. In *Fagan v. Troutman,* 24 Colo. App. 473, 135 Pac. 122, the instrument in question was a certificate of deposit; at page 480 (135 Pac. 124) the court said:

"The weight of authority seems to establish the rule almost beyond controversy that the indorsement of an instrument of the character we are considering is not necessary as a matter of law to sustain a gift *inter vivos* or one *causa mortis.*"

This seems to be the generally accepted rule.—*Ridden v. Thrall,* 125 N. Y. 572, 26 N. E. 627, 11 L. B. A. 684, 21 Am. St. 758.

Counsel lay great stress upon the clause in the two instruments wherein they refer to endorsed stocks. They are but a part of the evidence upon the subject, and if thus intended at the time executed, there is evidence that the deceased had different understandings with the donee prior to his death. She was prohibited from testifying and the testimony pertaining thereto was limited to the statements of Mr. Hall, the actions of the parties and the instruments executed by him concerning

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them, or a part of them. "All my stocks" are the words purported to have been used by him; "the stocks are hers" and similar expressions appear throughout the record, for which reasons, as stated, there is evidence, had the court so found, to justify a conclusion that the plaintiff was entitled to all the stocks under the theory of a gift *inter vivos.* Similar cases in some respects are: —*Fagan v. Troutman, supra; Gilkinson v. Third Ave. R. Co.,* 47 App. Div. 472, 63 N. Y. Supp. 792; *Roysson v. McCulley* (Tenn.) 59 S. W. 725, 52 L. R. A. 899; *Candee v. Connecticut Savings Bank,* 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568; *Garrison v. Union Trust Co.,* 164 Mich. 345, 129 N. W. 691, 32 L. R. A. (N. S.) 219; *Clinton v. McKeown,* 39 S. C. 21, 17 S. E. 504; *Tucker v. Tucker,* 138 Iowa, 344, 116 N. W. 119.

The judgment was against Jones and Grimes personally in damages for the conversion of the endorsed stock. It is urged, as they were acting in their official capacity, which fact was known to plaintiff, and as they received no personal benefit, but turned the stocks in as an asset of the estate, and as a part of it has since been sold by order of court as assets of the estate, that no judgment should have been rendered against them personally. We agree with this conclusion. We are not unmindful of the common law rule that in an action at law trover will not lie against an administrator in his representative capacity for the conversion of a legacy, or for the wrongful disposition of a stranger's property as a part of the decedent's estate, but lies against him in person. This rule, however, necessarily involves conduct on the part of the administrator in violation of his duty as such and is not applicable here. It is merely the recognition of the general principle of common law that a tort committed by an administrator is his individual act, rendering him, and not the estate, liable. No ele-

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ment of tort is presented here; the administrators were acting in the best of faith in the performance of their duties, as such, not only in their opinions, but in that of the judge appointing them. These facts were all known to the plaintiff, their actions, as well as hers, to some extent were controlled by the suggestion of the County Judge under a kind of mutual understanding whereby she voluntarily delivered the stock to the administrators as such, with the knowledge that it would be listed as a part of the assets of the estate, but with the further understanding as coming from the judge that her rights would be adjusted. It was understood that the estate was to receive the benefit should it be determined they belonged to it. Under such circumstances we are of opinion that the judgment should have been against them in their official capacity, and not as individuals. The trend of authority in this country seems to thus hold.

In Simpson v. Snyder, 54 Iowa, 557, 6 N. W. 730, the defendant, as administrator, took possession of and sold, as assets of his intestate, property owned by the plaintiff; held, that a judgment for the value of the property was properly rendered against him in his capacity as administrator. At page 558, the court says:

"The pleadings show that the property was taken and claimed by defendant as administrator, and that he sold the same as administrator. Defendant sets up no claim to the property in any other capacity. It appears, then, that the controversy is about property which the administrator claims belongs to the estate, and which he sold as administrator. He was chargeable, as administrator, with the proceeds of the property, and it is very plain that the estate, and not the defendant, should pay plaintiff the amount recovered in this action."

To the same effect in principle is *Von Schmidt v. Bourn,* 50 Calif. 616.

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In *White v. McFarland,* 148 Mo. App. 338, 128 S. W. 23, the administrator inventoried, in good faith, as assets of the estate, personal property which he refused to turn over to a claimant, believing that the property was in asset of the estate; held, that replevin would lie against him in his representative capacity, but not against him in his individual capacity, since judgment in replevin must be either for the return of the property or for its value, at the plaintiff's election. See also Vol. 18 Cyc. p. 296, 297.

It does not follow that the action should be dismissed, although instituted against Jones and Grimes personally, they intervened as administrators as did the administrator who succeeded them. Pattison and Finlayson, as heirs, etc., were also allowed to intervene and prayed that they be decreed the owners of this stock, etc. In their intervention pleadings they set forth that Pattison was a sister, and sole heir at law of Hall, etc.; that Finlayson by virtue of a decree of the District Court of El Paso county, in a suit between her and Pattison et al., was decreed to be the owner of one-half of the real estate; that they jointly were the owners, and entitled to the possession and enjoyment of the stock in suit, etc. They prayed for judgment decreeing ownership in them, etc. The plaintiff filed answers and cross complaints to the petitions of the intervenors, in which she alleged that the intervenors Pattison and Finlayson entered into a written agreement pertaining to the disposition of the assets of said estate, and a settlement of all contentions pertaining thereto, which agreement was in part for plaintiff's benefit, wherein it was provided.

"3. Out of the personal estate of the said Harry Hall the stocks and shares inventoried as belonging to Minnie Barndollar shall be considered to be her property, and the certificates relating thereto shall be delivered to her."

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It was then alleged that the shares and stock mentioned in this paragraph of the contract are those in suit; that if the plaintiff is not entitled to them by virtue of matters alleged in her original complaint, she became the owner and entitled to them by virtue of this agreement between Pattison and Finlayson, and prayed judgment accordingly and for general relief, etc. Issues were joined on this question.

The court held that this paragraph was not capable of specific enforcement because too ambiguous and uncertain. In this the court erred. The record discloses, that Mrs. Pattison was a sister and sole heir at law of the deceased; that Mrs. Finlayson was a sister of his wife, who died in 1896; that after his death she instituted a suit against Mrs. Pattison and others, wherein she set forth that Hall had acquired title to various parcels of real estate, the consideration therefor being furnished by his wife, under an agreement that he should only have a life interest therein, and by deed or will he would convey this property to the brother and sister of his wife, etc.; that the brother had since died, and that Mrs. Finlayson was the sole heir at law of his wife, etc. The prayer was that the property be considered as held in trust for this purpose and title be passed accordingly. A stipulation for a decree was filed in that suit which disclosed, that an agreement had been entered into between Mrs. Finlayson and Mrs. Pattison providing for a settlement and disposition after payment of expenses of all the assets of the estate between them, share and share alike, with the exception of the stock in suit. The paragraph above set forth was a part of this agreement and if susceptible of the construction claimed, the agreement then made disposition of the entire assets of the estate. A copy of the agreement was embodied in the stipulation, which provided for a decree of ownership of

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the real estate to be made and entered in that suit. The decree did not purport to determine the ownership of the personal property that was covered in the agreement only. This agreement was entered into after Mrs. Pattison and Mrs. Finlayson had been advised of the exact status of matters. Mrs. Finlayson had instituted her suit against Mrs. Pattison. Mr. Grimes, as one of the administrators had made a trip to England for the purpose of conferring with Mrs. Pattison. They were both represented by counsel, and it is reasonable to assume that their counsel knew of the details pertaining to Miss Barndollar's claim, and the substance of her evidence to support it. The inventory on file disclosed that the stock had been listed with the statement thereon that it had been found and taken from the possession of Minnie Barndollar; that it was claimed by her, and that the delivery was made under protest, waiving no right by reason thereof. Under such circumstances we cannot agree that there was any uncertainty as to the stock intended, or what was to be done with it. The fact that the agreement states, that the stock was inventoried as belonging to Minnie Barndollar, instead of saying it was inventoried as being claimed by her, in our opinion, is entitled to no weight whatever. There were no other stocks in dispute, hence, no other stocks could have been intended. To be inventoried in the matter of the estate it had to be as a part of its assets, yet in a sense it was inventoried as belonging to Miss Barndollar. It was claimed by her and was taken with the understanding that her claim as owner would be adjusted. If the language is to be followed, it is inevitable that she must be recognized as the owner and that it should be delivered to her.

The contention that the paragraph is meaningless, is not in harmony with the rules of construction to the effect that no part of a contract is to be rejected if capa-

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ble of any rational meaning. It will be observed the court did not hold that Miss Barndollar could not sue on this agreement, but that it was too ambiguous and uncertain to admit of specific enforcement.

Counsel make the further contention that the agreement is not of that class where a promise is made to one person for the benefit of another, where the latter may bring suit for its performance. They contend that the clause for Miss Barndollar's benefit is not supported by any consideration, also that there is no promisor or promisee, and they ask, who promised, and who was promised, that Miss Barndollar should have the stock. They contend that there was no promise on the part of either of the parties to the agreement; that this paragraph is simply a recital. We cannot agree with this line of reasoning. The contract must be considered as a whole, and when thus done the intention of the parties is clear. The object was to settle all contentions pertaining to the entire estate, that was to the interest of both parties to the agreement, and while it is true in a sense that the promise of each was to the other, the promise of each was not only for the benefit of the other but was also for the benefit of Miss Barndollar. Prior to this settlement Mrs. Finlayson claimed the real estate; she had instituted a suit to have it declared hers. Mrs. Pattison claimed the entire estate; she was made a defendant in the Finlayson suit. Miss Barndollar claimed the mining stock. The consideration for the Pattison promise to Finlayson was Mrs. Pattison's relinquishment of a part of her claim to the entire estate, the consideration for the Finlayson promise to Mrs. Pattison was Mrs. Finlayson's relinquishment of her claim to a certain interest in the real estate, for one of these considerations Mrs. Pattison promised Mrs. Finlayson that the stock should be considered to be the property of Miss Barn-

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dollar, and be delivered to her; for the other Mrs. Finlayson agreed likewise with Mrs. Pattison. Both were based upon valuable considerations from each to the other, and they both likewise got rid of the claim of Miss Barndollar; and if carried out as intended, it would have resulted in the settlement of all claims against the estate, and its disposition accordingly. It might also be observed, although immaterial to this contention, that Mrs. Finlayson's suit against Mrs. Pattison is based upon a somewhat similar agreement, namely, that of her sister with Mr. Hall for her benefit, and that Mrs. Pattison has recognized the validity of that agreement to the extent of entering into this one, which gives to Mrs. Finlayson under such claim one-half of the balance of this estate. Under the circumstances of this case the considerations were sufficient to support the validity of this paragraph in the Pattison-Finlayson agreement.

In *Green v. Morrison*, 5 Colo. 18, this court held,

"A third party, for whose benefit a simple contract has been entered into for a valuable consideration, moving from the promisee, may maintain an action in his own name."

This case is cited with approval in *Moore v. First National Bank*, 38 Colo. 336, 88 Pac. 385, 10 L. R. A. (N. S.) 1001, 120 Am. St. 120, 12 Ann. Cas. 268.

In Vol. 1 Parsons Cont., 7 Ed., page 497 it is said:

"In this country the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat more positively asserted; and we think it would be safe to consider this a prevailing rule with us; indeed it has been held that such promise is to be deemed made to the third party if adopted by him, though he was not cognizant of it when made."

In *Hendrick v. Lindsay*, 93 U. S. 145, (23 L. Ed. 855) the court at page 148 quotes with approval from *Pillman v. Van Mierop*, 3 Burr, 1663, as follows:

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"Any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrues to the party promising."

Other cases in point are:—*Lehow v. Simonton,* 3 Colo. 346; *Miliani v. Tognini,* 19 Nev. 133, 7 Pac. 279; *Painter v. Kaiser,* 27 Nev., 76 Pac. 747, 65 L. R. A. 672, 103 Am. St. Rep. 772, 1 Ann. Cas. 765; *Sacramento Lumber Co. v. Wagner,* 67 Cal. 293, 7 Pac. 705; *Ferris v. American Brewing Co.,* 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; *Hansdel v. Moore,* 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; *Zimmerman v. Zehendner,* 164 Ind. 466, 73 N. E. 920, 3 Ann. Cas. 655; *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003; *Hare v. Murphy,* 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851.

It is urged that plaintiff's cross complaint constitutes a departure from the original cause of action, and transfers it from an action in trover, to an equitable one, for specific performance; that it eliminates the original action at law by substituting an issue in equity conflicting with and differing radically from it, etc. As heretofore stated, the basis of the entire contention is, who was the owner of this stock. All parties who appear to be or who might be interested in any phase of any contention which might arise over it have voluntarily become parties to this action. Under such circumstances it would not only be a sacrifice of substance to form to say that every phase of this contention ought not, in this action, to be determined between the parties to it who are now in court, but to hold otherwise would be a long step backward in our modern system of procedure, without any reason therefor, other than possibly some cases cited as precedent, which adhere strictly to technical rules of

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procedure; but regardless of this we are not convinced that otherwise the plaintiff was not entitled to the relief prayed for against the intervenors. The distinction between actions at law and suits in equity and the distinct forms of actions and suits have been abolished in this jurisdiction. Section 23, Revised Code, 1908, provides that a party to the action against whom anything is demanded shall answer the petition in intervention, as if it were an original complaint in the action. The intervenors here made demands against the plaintiff that they be adjudged the owners of the stock. By her answer and cross complaint against them, the plaintiff claimed title thereto, and asked for its recovery, etc.; in such case there is authority which holds that whether the proof to sustain the claim is the evidence of ownership by virtue of the gift or under the contract, is immaterial.—*McNally v. McAndrew,* 98 Wis. 62, 73 N. W. 315.

But regardless of this, upon account of their voluntary intervention, and the injecting into the suit of their claim of ownership of the property, she was entitled by cross complaint to have that issue settled in this action. The Code says that the party against whom anything is demanded by the intervenor shall answer as if it were an original complaint. Had a suit been instituted against Miss Barndollar by the intervenors to secure these stocks, it would not be contended that she could not, by cross complaint, be decreed to be its owner and have judgment accordingly, etc. Being entitled to answer here the same as though it were an original complaint against her, there is no reason why she is not entitled to the same relief.

In a way this phase of the contention was in equity. One of the intervenors, Mrs. Pattison, was a resident of England; another, Mrs. Finlayson, of Georgia; they were before the court in this action, and in our opinion the

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great weight of authority is to the effect that the court had jurisdiction and should, as it did, make its findings and render judgment upon all controversies between the parties concerning the property in dispute.—*Scammon v. Kimball,* 92 U. S. 362, 23 L. Ed. 483; *Crim v. Handley,* 94 U. S. 652, 24 L. Ed. 216; *Embrey v. Palmer,* 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; *Knox Co. v. Harshmann,* 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586; *Marshall v. Holmes,* 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; *Rolling Mill Co. v. Ore & Steel Co.,* 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565; *Plattner Implement Co. v. Bradley & Co.,* 40 Colo. 95, 90 Pac. 86; *Ewing-Merkel Electric Co. v. Lewisville Co.,* 92 Ark. 594, 124 S. W. 509, 30 L. R. A. (N. S.) 21, 19 Ann. Cas. 1041; *Porter v. Roseman,* 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222, 6 Ann. Cas. 718; *Quick v. Lemon,* 105 Ill. 578; *Van Bibber v. Fields,* 25 Or. 527, 36 Pac. 526; *Conklin v. Botsford,* 36 Conn. 105; *Mayes v. Stephens,* 38 Or. 512, 63 Pac. 730, 64 Pac. 319; *Zorn v. Livesley,* 44 Or. 501, 75 Pac. 1057.

We are not impressed with the contention that because the plaintiff instituted another action, wherein upon other grounds she made claims to the entire estate of Mr. Hall, (which suit was thereafter dismissed) that her position therein was inconsistent with her claim here, to the extent that it would estop her from prosecuting this suit. No authorities have been cited which hold that the owner of property may lose title thereto by making claim to other property along with it. Had the wife of the deceased made claim to his entire estate as sole heir at law in a suit wherein it developed that he had children living by a former wife, this would not estop her from making the contention that the husband, during his lifetime had made her a gift *inter vivos* of certain personal property found in her possession after his demise, and for that reason that it was not a part of his estate. The same principle is applicable here.

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The judgment will be reversed and the cause remanded with instructions to dismiss the action against Grimes and Jones personally, and to enter judgment against the intervenors in favor of Miss Barndollar, decreeing that she was the owner of the stocks described in her original complaint, endorsed and unendorsed, and was entitled to its possession at the date of the execution of the contract above mentioned, and where disclosed by this record or may hereafter be shown that any of the stock has been disposed of by the intervenors or any of them, that she have money judgment for such conversion, and that her damages for the detention of that undisposed of, if any, to be delivered to her, as well as for that sold, be upon the basis that she was the owner and entitled to its possession as of the date last mentioned. The costs in both courts accruing after the intervenors became parties to the action will be taxed against them. Those incurred prior thereto should be paid by the defendant in error.

Reversed.

Decision *en banc.*

On Petition for Rehearing.

Counsel for plaintiffs in error urge that in any event our opinion should be modified to the extent that the judgment to be entered should be confined to the intervenors, Pattison and Findlayson; and for the stocks disposed of, it should only be for their value at the date of the execution of the Pattison-Finlayson agreement. We cannot agree with either of these positions. The intervention of the administrators as such was in order that they might resist the claim of the defendant in error to these stocks and the value thereof, and was allowed at their request. They alleged that they had theretofore

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secured possession of the stocks and had charged themselves with the receipt of them as assets of the estate, and were proper parties to defend against the claim of the defendant in error to the stocks, or their value, as representing the interest of those who should become entitled to it, etc. The record discloses that the administrators had the stocks in their possession as administrators, and that they had disposed of a part of them and applied the proceeds to the use and benefit of the estate. What has been done in this respect since the rendition of the judgment by the trial court, is not disclosed. In the circumstances of this case and in order that it may be a final determination of this contention between the parties, we think it proper that the judgment should run against all the intervenors. This includes the administrators in their official capacity as such.

Referring to the second contention, we adhere to our former opinion for the reasons therein stated. The defendant in error became the owner of the stocks under the Pattison-Finlayson agreement (if she was not before its execution), and for this reason was entitled to their possession at the date of the execution of this contract, but we cannot agree that her damages should be limited to their value as of that date. A demand therefor appears to have been made upon the administrators about December 7, 1910. This demand was refused. There is no evidence that all of these stocks were disposed of before this date or have ever been. The Pattison-Finlayson agreement bears date April the 12th, 1909. In the *Continental Divide M. I. Co. v. Bliley,* 23 Colo. 160, 46 Pac. 633, this court, in substance, said that while different rules appear to prevail in England and in some American states as to the correct measure of damages in such cases, the tendency of modern decisions supported by the weight of authority sustains the rule that

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its market value upon the day of the conversion, to-wit, the time when the owner, being entitled to immediate possession of the stock, demands the same and is refused; and while it was there said that perhaps exceptions to the rule should be allowed in some cases, this was the rule adopted in that case, and we think is the rule that should be adopted here with the exceptions that the defendant in error should be entitled to an additional amount equal to any dividends paid upon any of this converted stock between the date of the Pattison-Finlayson contract and the date of her demand therefor with interest upon the entire amount from the date of the demand.

The record does not show that all of the stocks have been disposed of, but there is nothing before us to show that they have not all been disposed of since the trial. The directions in the original opinion were upon the theory that a part of them could and would be returned, and while there would probably be no difference in the ultimate result, yet in the Bliley case, *supra,* this court treats stocks as being converted, when the owner, being entitled to its immediate possession, demands the same and is refused. This seems to be the general rule and after further consideration we are of opinion it should be followed here and this case disposed of upon the theory that all of those stocks were converted at the time of the demand for them and the refusal to comply therewith. The directions in the original opinion will be modified accordingly.

The petition for rehearing is denied.

Decided December 7, A. D. 1914. Rehearing denied February 1, A. D. 1915.

On Motion to Recall Remittitur and Correct Mandate.

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Per Curiam.

After the remittitur was issued it was made to appear that the mandate directing judgment against the administrators in their official capacity was not justified by the facts disclosed by the record. Thereupon, at the request of counsel representing all parties, the remittitur was recalled. It appears that Thomas, as administrator *de bonis non,* petitioned the trial court to be substituted in place of Grimes and Jones as defendants in their individual capacity, and as administrators of the estate. On this petition an order was entered substituting Thomas, in his representative capacity, in place of Grimes and Jones, as administrators, but denied as to them individually. It thus appears that subsequent to this order. Grimes and Jones were not before the trial court in their representative capacity, and hence, not here as such, and it was a mistake to direct a judgment against "the administrators in their official capacity," when in fact there was but one, namely, Thomas. It is therefore ordered that the mandate of this court be corrected so it will direct that judgment be entered against all the intervenors, in accordance with the views expressed in the opinion, which includes the administrator, Thomas. Let remittitur issue accordingly.

Mandate corrected.

Mr. JUSTICE SCOTT dissents.

Mr. JUSTICE TELLER not participating.

SCOTT, J., dissenting.

I do not doubt the power of the court to recall its remittitur, at least within the term at which the judgment was rendered, in case where an order or judgment

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was improperly granted upon a mistake of fact, or erroneous suggestion, and to make any change or correction even to the rendition of an entirely different judgment. This court upon its own motion exercised that power in the case of *Chenoweth v. State Board of Medical Examiners*, 57 Colo. 73, 73, 141, Pac. 132, 51 L. R. A. (N. S.) 958.

I agree that the judgment in this case should be in favor of Barndollar, and this because of the agreement between Pattison and Finlayson, but I cannot agree that the measure of damage allowed can be sustained upon any theory, and for such reason the judgment should be corrected in that respect.

Conceding title to the stocks to be in Barndollar, still there was no wrongful conversion upon the part of any person, either personally or in a representative capacity. Even so, there can be no recovery in such a case without demand first having been made.

In my view of the law, there was no demand in this case. But if we concede a demand to have been made, then such demand was upon Jones and Grimes personally, and not as administrators.

The suit was instituted against them personally, a demand was upon them personally alleged, and in the answer to each petition in intervention is to be found the repeated denial that Jones and Grimes acted in their capacity as administrators, and also repeated allegations that they acted in their individual capacity.

A demand upon one as an individual is not a demand upon him as an administrator, and particularly when the party making the demand expressly declares the demand to be upon the individual and not the official.

For such reason the arbitrary date fixed in the judgment as the date of the demand is without basis, either in law or fact. There can be no recovery for conversion when the essential elements of conversion are wanting.

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The defendants plead and prove a tender to the plaintiff of a large part at least, of the stocks involved, on May 1, 1910. This tender appears to have been unconditional and was refused. Certainly these stocks at least should be excepted from the judgment, in so far as it may relate to depreciation in value after that date.

[No. 8132]

RUSSELL ET AL. v. JORDAN ET AL.

ADOPTION OF CHILD. *Effect.* The statutes regulating the adoption of children (Rev. Stat. secs. 526, 529, 7042) make the adopted child the heir of the adopting parent, and the adopting parent the heir of the child if he die without marriage or issue; but the latter provision does not extend to the heirs of the adopting parent.

The children of the adopting father do not inherit from the adopted child. (450)

Error to Rio Grande County Court.—Hon. JAMES W. WHITE, Judge.

On Rehearing.

MESSRS. PALMER & TRUE, Mr. JESSE C. WILEY, and Mr. ALBERT L. MOSES, for plaintiffs in error.

Mr. A. L. JEFFERY, and Mr. EDWIN H. STINEMEYER, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is a case to determine heirship. Nathan Russell by his first wife had three children, who are the de-

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fendants in error. Subsequent to the death of this wife he was again married to a widow with a minor child, named John Albers. By this marriage Russell had three children, who are the plaintiffs in error here. The second wife died and thereafter Russell, in the manner provided by law, adopted her child, John Albers, who took the name of John Albers Russell. Russell married a third time and afterwards died without issue from the third marriage. The estate of Russell, aside from the widow's share, was divided equally between all his children, including the adopted son. Later, John Albers Russell, the adopted son, died intestate, unmarried and without issue.

This proceeding is upon error to the county court ordering an equal division of the estate of John Albers Russell between the six children of Nathan Russell.

It is the contention of plaintiffs in error, that being related by blood, they alone are entitled to participate in the distribution of the estate of John Albers Russell.

It is said that by the common law inheritable interest follows the blood. That adoption was unknown to the common law, and comes from the civil law. That it rests upon statutes entirely, and while these statutes do in a degree modify and change the common law rule of descent and distribution, this change goes no further than the provision of the statute. That the property of John Albers Russell descends, as would the property of any other decedent, to the next of kin, except as our statutes change the line of descent because of his adoption by Nathan Russell. This must be conceded to be a fair statement of the law upon this subject.—*Webb v. Jackson,* 6 Colo. App. 211, 40 Pac. 467.

It is agreed by counsel that the question here to be determined has not been considered, nor have our adoption statutes been construed in that respect by the ap-

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pellate courts of this state. Our statutes upon this subject for consideration here are, Revised Statutes 1908, as follows:

Sec. 526. "A decree of adoption shall be rendered and entered by the court declaring such person the heir at law of the petitioner or petitioners and entitled to inherit from the petitioner or petitioners any or all property in all respects as if it had been petitioners' child born in holy wedlock."

Sec. 529. "The natural parents shall, by such order, be divested of all legal rights and obligations in respect to the child, and the child be free from all legal obligations of obedience and maintenance in respect to them; such child shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges and subject to all the obligations of a child begotten in lawful wedlock; but upon the decease of such person and the subsequent decease of such adopted child without issue, the property of such adopting parent shall descend to his or her next of kin, and not to the next of kin of such adopted child."

Sec. 7042. "Legally adopted children shall be to all intents and purposes, children and legal heirs of the person so adopting them, entitled to inherit as fully as children of the foster parents begotten in lawful wedlock, and in case any such adopted child shall die, leaving no husband, wife or children, then the foster parents shall inherit as though such adopted child had been a child of such foster parents born in lawful wedlock."

Sec. 526 was enacted in 1885, and appears to have been adopted bodily from the Ohio statutes. The statute was constructed by the supreme court of Ohio before it was enacted by our legislature. It has been held by this court that prior construction under such circumstances is at least strongly persuasive upon the courts of this state,

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for the reason that the presumption is that the law was enacted in the light of the construction given it by the courts of the state from which the statute was taken.

The supreme court of Ohio in an opinion rendered in 1880, in the case of *Upson v. Noble,* 35 Ohio St. 655, in construing the statute that now constitutes our Section 529, Rev. Stat. 1908, said:

"This statute, in so far as it changes the general course of descents and distribution of intestate property, and ignores all merit on account of blood, should be strictly construed. And while we find in its a clear declaration that the adopted child shall be the 'legal heir' of its adopting parents, there is no express provision that it shall be capable of inheriting from any other person, or of transmitting an inheritance to any one. It is true that it is declared to be the 'child,' to all legal intents and purposes, of the adopters, as if begotten in lawful wedlock; but if the relation thereby created was intended to bring the parties to it within the operation of the general statute regulating descents and distribution of estates, the additional words, 'and legal heir of his or her adopter or adopters,' would have been entirely superfluous. Now, as we cannot assume that these additional words were not intended to have an operation, which the statute without them would not have, their use suggests that the word 'child' was not used in the sense of 'heir' within the meaning of the general statute relating to descents and distribution. And when we consider the context the truth of the suggestion is made quite palpable. It is declared that by such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child * * * of his or her adopter,

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thus showing that the legislature was dealing with personal rights and duties growing out of the relation of parent and child, by transferring them from the natural to the adopted relation."

The doctrine of this case was later affirmed by the same court in the case of *Phillips v. McConica,* 59 Ohio St. 1, 51 N. E. 445, and wherein further reasons were advanced in support of it. The court said:

"True, section 3140, Rev. Stat. provides that such adopted child 'shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations, of a child of such person, begotten in lawful wedlock.' But this is far from providing that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors. It was well said in *Upson v. Noble,* 35 Ohio St. 658, that in passing the adopting statute 'the legislature was dealing with personal rights and duties growing out of the relation of parent and child, by transferring them from the natural to the adopted relation.' The statute enables the adopted child to inherit from its adopter, but not through him. The statute does not make the adopted child the heir of the ancestors of its adopter, and the right of the adopted child to inherit cannot be extended beyond where the statute has fixed it. The statute in this regard must be strictly construed, as held in 35 Ohio St. 658. Adoption does not change the law of descent and distribution as to the property of the ancestors of the adopter.—*Quigley v. Mitchell,* 41 Ohio St. 375. The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this state; and to

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allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors."

It will be seen that the conclusion reached in these cases, the relation created by adoption is regarded as personal between the adopting parent and adopted child. That while the statute makes the adopted child an heir of the adopting parent, and provides that if the adopted child shall die without marriage or issue, his estate shall go to the adopting parent, the provision does not apply to the heirs of the adopting parent, and in such case the general law of descent applies.

The doctrine of the Ohio cases is supported by the following among other authorities:—*Helms v. Elliott,* 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535; *Hockaday v. Lynn,* 200 Mo. 456, 98 S. W. 585; *Boaz v. Swinney,* 79 Kan. 332, 99 Pac. 621; *Hole et al. v. Robbins et al.,* 53 Wis. 514, 10 N. W. 617; *Van Derlyn v. Mack,* 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879.

But the statutes of the several states are widely different in the matter of adoption of children and there is likewise striking want of uniformity of opinion concerning similar statutes.

The following cases among others, take a contrary view from that adopted in the above cited cases.—*Humphries v. Davis,* 100 Ind. 274, 50 Am. Rep. 788; *Hilpire v. Claude,* 109 Iowa, 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524; *Flannigan v. Howard,* 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201; *Calhoun v. Bryant,* 28 S. D. 266, 133 N. W. 266; *Swick v. Coleman,* 218 Ill. 33, 75 N. E. 807.

For the reasons above stated, and because of the seeming weight of authority in support thereof, we have adopted the reasoning of the Ohio authorities.

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The judgment is reversed. Former opinion withdrawn.

In banc.

Decided December 7, A. D. 1914. Rehearing granted. Decided on rehearing April 5, 1915.

[No. 8326]

BEELER v. THE PEOPLE.

1. CRIMINAL LAW. *Larceny—Evidence*, examined and found amply sufficient to warrant a conviction. (452, 454)

2. ——*Instructions. Indictment for Larceny.* The evidence was circumstantial, and the court charged that the circumstances relied upon by the prosecution, should, to warrant a conviction, be made out beyond a reasonable doubt, and be "substantially inconsistent" with the prisoner's innocence; "practically incompatible with any reasonable hypothesis of his innocence;" "clearly and substantially made out," beyond reasonable doubt. The phrases quoted were condemned as a departure from the phraseology established and approved in like cases, but the evidence of guilt being overwhelming, *held* that they were not prejudicial. (455)

3. WORDS AND PHRASES *"Clearly and Substantially," "Practically Incompatible,"* construed. (451, 458). Hill, J., dissented.

On rehearing.

Error to Park District Court.—Hon. CHARLES A. WILKIN, Judge.

Mr. GEORGE S. REDD, for plaintiff in error.

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Hon. FRED FARRAR, Attorney General, Mr. WENDELL STEPHENS, Assistant Attorney General, for The People.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

October 23, 1913, plaintiff in error, Harry L. Beeler was convicted of the larceny of one head of neat cattle, the property of D. M. Walker, and sentenced to the penitentiary. He brings the case here on error, and asks us to reverse the judgment for the reasons, as he contends, that the *corpus delicti* was not established, that the evidence was insufficient to support the verdict, and the instructions erroneous.

January 15, 1913, Walker, while riding in company with one Huntley, came upon the carcass of a freshly killed and partly butchered young Hereford steer bearing his brand, about 250 or 300 yards from the house where Beeler lived with his parents. The body was still fresh and warm from animal heat, the head had been severed and carried away, the carcass was cut transversely across the middle, the back-bone severed and the brisket opened with an axe or hatchet. The animal was in prime condition, very fat and perfectly normal, sound and healthy. It had bled freely when killed, as evidenced by the clean white flesh, and hide, the absence of blood between the flesh and skin, and the colorless condition of the flesh side of the hide, and the vital organs were all sound, healthy and normal.

The theory of the prosecution was, that defendant rode from his barn or corral to a bunch of cattle belonging to Walker, cut out a steer and after driving it some distance, had shot it in the head, cut off the head and was quartering the carcass when he was interrupted or became frightened, took the head to the house, and later burned it.

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A recent fall of snow had obliterated all old tracks and it appeared, from the people's evidence, that freshly made tracks disclosed that someone leaving Beeler's barn that morning on horseback, had ridden to a herd of cattle, where an animal was separated from the bunch and driven away. The tracks of the horse followed those of the animal and led directly to the carcass found by Walker and Huntley. These tracks indicated that the horse had been left about 23 paces from the animal, and from this location a man's tracks could be traced to the carcass, back again to the horse, and from there the horse's tracks led directly back to Beeler's barn. Following the tracks between the position of the carcass and the barn, blood stains appeared at intervals on the snow and in places there were indications that some object had been dragged along for a short distance. As the parties who were investigation the matter, while following the trail, approached Beeler's house, they saw defendant run out, pick up the head, put it in a sack and carry it into the house. They called him out and interrogated him as to what he knew concerning the dead animal and in reply to questions he stated that while rabbit hunting that day, he had found the steer dead, cut off its head for his dogs, and cut open the carcass so they could better get to it to eat. He denied any knowledge of how the animal had met his death; but said that someone must have shot it from the ridge. During the conversation he said that while he had nothing to do with killing the steer, still he would rather pay Walker for it than have him think he did. The parties then requested the privilege of examining the head, but he told them the dogs had carried it away and he could not find it. In answer to questions, he said it was not the head he put into the sack upon their approach, but was bones he picked up and carried into the house for the purpose of grinding

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into chicken feed. They then requested permission to examine the house and see the bones in the sack, but defendant said he had no authority to grant the request as the premises belonged to his mother, and when the request was made to her, she flatly refused the permission without a search warrant. About two hours afterward, in riding by the Beeler house, it was noticed the surrounding atmosphere was filled with the odor of burning hair and flesh. The country was sparsely settled and a careful survey of the vicinity disclosed no tracks except those leading from Beeler's barn to the bunch of cattle, from there to the carcass and back to the barn.

1. Under these circumstances we think the evidence ample to show that a crime had been committed and that the jury were justified in finding that defendant perpetrated the crime; in fact we do not see how they possibly could have arrived at any other verdict. Since the motion for a rehearing was granted we have read the bill of exceptions through with great care, and find that the evidence amply sustains the *corpus delicti,* and the guilt of the defendant. It would have been a travesty upon justice had the jury returned any other verdict.

2. In the former opinion we stated, "Perceiving no error in the instructions * * * the judgment will be affirmed." Bitter complaint is now made because we disposed of the case, as is said, without considering the instructions, and we will now discuss them. Instruction 1 defines the offense and tells the jury before they can convict defendant they must be satisfied from the evidence beyond a reasonable doubt that the crime charged was committed by him at Park county, Colorado. Instruction 2 defines a reasonable doubt and tells the jury the defendant is presumed to be innocent of the crime charged until proven guilty, and unless they are satisfied from the evidence beyond a reasonable doubt of his guilt,

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they must acquit him. Instruction 4 contains the alleged objectionable phrases or expressions, and is substantially as follows: The evidence in part at least, is circumstantial, that is, direct evidence as to how the steer came to his death, whether he was killed by human agency, and if so, by whom, is absent, and the jury are advised that the facts and circumstances relied upon for sustaining the charge should be made out to the satisfaction of the minds of the jury beyond a reasonable doubt; the facts and circumstances thus made out should not merely be consistent with the guilt of the defendant, but they should be substantially inconsistent with his innocence; that is, they must be practically incompatible with any reasonable hypothesis of the defendant's innocence; if the facts and circumstances in evidence are subject to be reasonably explained upon the theory that the defendant is innocent, then it would be your duty to regard the circumstantial evidence as insufficient, but otherwise, if the facts and circumstances are clearly and substantially made out from the evidence to the satisfaction of the minds of the jury beyond a reasonable doubt, and the effect and significance of those facts is that the defendant is guilty, and the effect and significance of those facts in the minds of the jury is not only that the defendant is guilty beyond a reasonable doubt, but that he could not reasonably be innocent, consistently with such facts and circumstances, then it would be the duty of the jury to find defendant guilty as charged, otherwise it would be your duty to return a verdict of not guilty.

Complaint is made of the expressions: "substantially inconsistent," "practically incompatible," "clearly and substantially made out," "effect and significance of those facts." In criminal cases, where the evidence is circumstantial, it is proper for the court to explain to the jury that circumstantial evidence is competent and

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will amount to proof of the offense where the facts and circumstances in connection with the other evidence on the trial satisfies the minds of the jury beyond a reasonable doubt of defendant's guilt. It is not a question of whether the evidence is direct or circumstantial; but whether it satisfies the minds of the jury of the guilt of the defendant beyond a reasonable doubt. In cases where circumstantial evidence is relied upon for a conviction the facts and circumstances in evidence on the trial must not only be consistent with the defendant's guilt beyond a reasonable doubt, but inconsistent with any reasonable hypothesis or theory of his innocence. If the facts and circumstances on the trial, relied upon for a conviction, can be reasonably explained or explained upon any reasonable theory of defendant's innocence, then circumstantial evidence alone is insufficient to warrant a conviction, but if the facts and circumstances in evidence in connecton with the whole evidence on the trial satisfies the minds of the jury beyond a reasonable doubt of defendant's guilt, they amount to proof of the offense and the jury should return a verdict of guilty. In a proper case it is usual upon request to give appropriate instructions explaining the law of circumstantial evidence without using such qualifying words or expressions as were given in instruction 4, except the word reasonable. The circumstances must be incompatible with any reasonable theory of innocence or incapable of being reasonably explained upon any theory of defendant's innocence.

We do not approve of this instruction or recommend it as a model. The court had better have stayed within the trodden path and not experimented with these unusual expressions in such an instruction; but it does not follow that the case should be reversed on this account. We should not reverse the case unless it preju-

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diced the rights of the defendant. The use of the words even under the defendant's contention or construction of them was without prejudice to him. Instruction 4 tells the jury the facts and circumstances must be clearly and substantially made out from the evidence to the satisfaction of the jury beyond a reasonable doubt; that the facts and circumstances must be consistent with the guilt of the defendant and substantially inconsistent with his innocence and practically incompatible with any reasonable hypothesis of his innocence; if they should be reasonably consistent upon the theory of his innocence, the circumstantial evidence was insufficient. But if the effect and significance of the facts and circumstances in evidence on the trial, on the minds of the jury was not only that he was guilty beyond a reasonable doubt, but that he could not reasonably be innocent consistently with such facts and circumstances, they should find him guilty; otherwise, not guilty. Considering the instructions as a whole it is evident the jury must have understood from the language used, they could convict the defendant only in the event the facts and circumstances in evidence on the trial satisfied their minds beyond a reasonable doubt of his guilt, and if they could explain such facts and circumstances upon any reasonable theory of his innocence, they must acquit. When we consider that the evidence of the defendant's guilt is overwhelming, we do not think he was prejudiced in the least by instruction 4.

3. There is no doubt but the court in using such expressions as "Substantially inconsistent," "practically incompatible," "clearly and substantially made out," "effect and significance," intended to safe-guard the rights of the defendant. The Century Encyclopedia and Dictionary defines "substantially" as, "with reality of existence." In *Cheeseman v. Hart,* (C. C.) 42 Fed.

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99, it is said: "The term substantially means really, truly, essentially, competently." In *Commonwealth v. Wentworth,* 118 Mass, 441, it is said: "The word substantially being clearly used as meaning really or essentially." In *Western Assurance Co. v. Altheimer,* 58 Ark. 565, 25 S. W. 1067, the court held that substantially means "in a substantial manner; clearly; solidly; truly; competently."

We are satisfied the word was used in the instruction, not as a matter of form, but as going to the substance of the inconsistency and placed a burden upon the people rather than the defendant, of which he cannot complain. It means as used in the instruction, having a reality of existence; that the inconsistency with his innocence which will warrant a conviction must have a substantial existence; that is, it must be of a true, actual, substantial character and have a well founded and substantial existence in fact. It was intended to show that the prosecution must prove that really and truly the facts and circumstances are inconsistent with the innocence of the defendant.

In Century Encyclopedia and Dictionary, "clearly" is defined as "to leave no doubt."—*McEvony v. Rowland,* 43 Neb. 97, 61 N. W. 124, defines "clearly" to mean: "without uncertainty, beyond a question, or beyond a reasonable doubt." In *People v. Wreden,* 59 Cali. 393, it is held the expression "clearly established by satisfactory proof," is the full equivalent of established by satisfactory proof beyond a reasonable doubt. So we see the expression "clearly and substantially" as used in this instruction, simply meant beyond a reasonable doubt and was surplusage, adding nothing to the instruction and should have been omitted. In *Moore and Ray v. Wilder,* 66 Vt. 33, 28 Atl. 320, the court construes "practical" to mean: "what would be practical, reasonable, feas-

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ible." As used in instruction 4 "practically incompatible" means reasonably incompatible. It means the same thing as used in connection with "reasonable hypothesis," was surplusage, and should have been omitted.

The court told the jury that the effect and significance of the facts and circumstances upon the minds of the jury must not only be that the defendant was guilty beyond a reasonable doubt, but that he could not reasonably be innocent. "Effect and significance" as so used, means the result or conclusion in the minds of the jury. It means that the evidence must leave a result or conclusion in their minds, not only that the defendant is guilty beyond a reasonable doubt; but that he could not reasonably be innocent and the facts and circumstances be true. If the facts and circumstances were clearly and substantially made out from the evidence on the trial to the satisfaction of the jury beyond a reasonable doubt and the effect and significance, that is, the result and conclusion produced from those facts on the minds of the jury is that defendant is guilty beyond a reasonable doubt, he has no ground for complaint.

While we said we do not recommend instruction 4 as a model, it is clear the expressions complained of as used in this instruction are not a departure from the law governing circumstantial evidence.

The former opinion is withdrawn and the judgment affirmed.

Affirmed.

Decision *en banc.*

Mr. JUSTICE BAILEY and Mr. JUSTICE SCOTT not participating.

Mr. JUSTICE HILL dissents.

Mr. JUSTICE HILL dissenting:

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I cannot agree with the conclusion. In my opinion, Instruction No. 4 is fundamentally wrong, as well as misleading, and was prejudicial to the rights of the defendant. Neither can I agree that the expressions complained of are not a departure from the law governing circumstantial evidence. This instruction tells the jury. 'that the facts and circumstances thus made out, (viz, those relied upon to sustain the charge) should not merely be consistent with the guilt of the defendant, but they should be substantially inconsistent with his innocence, that is, they must be practically incompatible with any reasonable hypothesis of the defendant's innocence. Neither of these assertions has ever been the law in this jurisdiction. No case has been cited which thus holds, and I vouch the statement that none can be produced which even tends to support such a conclusion. This instruction, in substance, tells the jury that they should convict the defendant if the facts and circumstances upon which they rely are substantially inconsistent with his innocence, or practically incompatible with any reasonable hypothesis of his innocence. It is elementary that the law is and always has been, that to convict a defendant on circumstantial evidence, it must not only be consistent with his guilt beyond any reasonable doubt, but be inconsistent (not substantially inconsistent only) with any other reasonable conclusion. Likewise, it must be incompatible, not practically incompatible, with any reasonable hypothesis of the defendant's innocence. To hold that this was not error or that the jury could not have been mislead by it, in my opinion, are erroneous conclusions. Both words qualify or modify and tend to weaken the instruction. The language has been condemned and held insufficient in indictments and informations.—*Edgerton v. State,* 70 S. W. (Texas), 90; *Thomas v. The State,* 103 Ind. 419.

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It has also been given a different meaning and effect in civil cases.—*Morris v. Hokosona,* 143 Pac. (Colo. App.) 826; *Elliott v. Caldwell,* 43 Minn. 357; *Hardin County v. Wells,* 108 Iowa 174.

The conclusion that these words placed a burden upon the people, rather than the defendant, of which he cannot complain, in my opinion, is clearly erroneous. Had they referred to anything which the defendant was required to prove, there might be some force to this contention; but they refer solely to what the people must overcome, and in substance say they need not entirely overcome it, but it is sufficient if they substantially do so, or if they practically do so. As I view it, these expressions modify the words "inconsistent" and "incompatible" and the words "substantially inconsistent" do not mean the same as "inconsistent," and "practically incompatible" does not mean the same as "incompatible," but as given in this instruction it left it to the jury with these words thus qualified to enter upon the sea of conjecture, viz, to consider the effect of something less than, or almost essential, but not wholly, or not fully, and this in a case where conjectures are not to be permitted, but where it is elementary that the proof should establish the guilt of the defendant beyond a reasonable doubt.

Decided December 7, A. D. 1914. Rehearing granted December 9, A. D. 1915. Affirmed on rehearing March 1, A. D. 1915.

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[No. 7562]

GREELEY & LOVELAND IRRIGATION COMPANY v. FARMERS PAWNEE DITCH COMPANY.

1. WATER RIGHTS. *Storing Water Without Appropriation for Storage.* The senior appropriator whose only right is for direct irrigation may not store flood water, even temporarily, when it is needed by a junior appropriator below him, and this even though his ditch is temporarily in such condition that to turn the flood water into it would have caused it to break and overflow. (464, 465)

2. PLEADINGS. *Sufficiency.* Complaint for the wrongful detention of flood water to which the plaintiff was entitled need not aver that, if not interrupted, the flood would have reached plaintiff, or would have been available to him. Injury to the plaintiff will be presumed, in the first instance, and the burden is upon defendant to allege and prove the contrary. (465)

3. ——*Answer—Defense Not Pleaded*, evidence of will not be considered in the court of review. (466)

4. EVIDENCE—*Burden of Proof.* One who defends an action for a tort upon the ground that no injury resulted to his adversary has the burden of proof. (465)

5. VENUE—*Petition for Change—Waiver.* Defendant answering and going to trial on the merits waives any error committed in denying his application for a change of the venue. (466)

6. APPEAL AND ERROR—*Errors not Assigned*, will not be considered. (466)

Error to Logan District Court.—Hon. H. P. BURKE, Judge.

Mr. L. R. RHODES, and Mr. C. D. TODD, for plaintiffs in error.

Messrs. ALLEN & WEBSTER, and Messrs. STEPHENSON & STEPHENSON, for defendant in error.

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Mr. JUSTICE GABBERT delivered the opinion of the court:

On the merits, the question involved is whether the Greeley and Loveland Irrigation Company wrongfully impounded and held in its reservoir water which should have been permitted to flow down the stream, from which it was diverted, to supply the priorities of defendant in error. The latter brought an action against the irrigation company and certain water officials, the purpose of which was to compel the return of the stored water to the stream, and to restrain the commission of such alleged wrongful acts in the future. The judgment was in favor of plaintiff, and defendants have brought the case here for review on error.

Briefly, the facts presenting the merits of the controversy are as follows: The irrigation system of the defendant company is located on the Big Thompson, a tributary of the South Platte, in Water District No. 4. The plaintiff owns an irrigation system on the South Platte in Water District No. 64. Each has decreed priorities for direct irrigation. The headgate of the plaintiff company is about 175 miles below the headgate of the defendant company. On the afternoon of June 21, 1911, a heavy rain storm occurred on the Big Thompson, above the intake of the canal of the defendant company, which caused a great volume of water to flow down the stream. The defendant company has a decreed priority for direct irrigation for 297 feet, as of date April 1, 1881. Previous to the storm it had been receiving 133 feet of water, which it was then utilizing by checks in its ditch, so as to cause the water to flow in the various laterals supplied through that channel. This volume of water represented priorities which were in advance of the one dated April 1, 1881. To turn the appropriation of 297 feet into the ditch, with the checks set, would

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have caused it to break and overflow. Under these conditions, with the consent of the Water Commissioner in Water District No. 4, which embraces the Big Thompson, the defendant company diverted and stored in its reservoir some ten or twelve million cubic feet of water from the flood waters caused by the storm to which we have referred. The object of storing this water was to provide a supply for use later in the season. At this time the defendant company did not have a decree for storage purposes. The plaintiff has a decreed priority for direct irrigation for 150 feet per second, as of date June 22, 1882, and diverts the water to which it is thus entitled in Water District No. 64. It also has other priorities. At the time of the storm and during the period the defendant company was storing the flood water, there was not sufficient flowing in the stream at the headgate of plaintiff's ditch to supply its decreed priorities which were then needed by its consumers.

In this jurisdiction priority of appropriation for a beneficial use has always been recognized as the foundation upon which water rights depend. When the diversion of the flood waters occurred, both corporate parties were entitled to divert water from the stream for direct irrigation, and for immediate application to lands, to the extent their priorities were needed, and could be lawfully supplied; but there was not sufficient water flowing at the headgate of plaintiff to supply those it had been awarded, and were then required to irrigate lands under its system. The right of defendant company was senior to plaintiff, but it did not have any right to divert water for storage to the detriment of plaintiff. In other words, its right was limited to a diversion of water for direct irrigation, to be at once applied to lands under its system, consequently it was without right to divert and store such waters, when by so doing the plaintiff company

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was deprived of water to which it was entitled for direct irrigation. Nor does the fact that the physical condition of the ditch of the defendant company at the time of the flood was such that the volume of its priority could not be utilized by turning it into that channel change the situation. The right of the defendant to store water must be measured by its right to divert water for this purpose at the time it did, and not by the physical condition of its ditch.

On behalf of the defendant company it is contended that the complaint fails to state a cause of action, because it is not alleged that had the flood water not been intercepted by storage it would have reached the headgate of the plaintiff. It is also claimed the testimony fails to establish that had this water not been diverted it would have been available for the use of plaintiff, and hence the judgment is contrary to the law and the evidence. These propositions can be considered together. The water involved did not belong in specie to the plaintiff, but when it appears as it does, from the allegations of the complaint and proof, that it has a decreed priority to the use of water from the stream, the flow of which would presumably be augmented by the flood water diverted, and at the time of such diversion was in need of water to supply its priorities, it will be presumed that the volume in the stream was depleted to its injury as the result of the wrongful diversion by the defendant company. So that instead of plaintiff being required to allege and and prove such facts it was incumbent upon the defendant company to allege and prove them in order to excuse its wrongful act.—*Peterson v. Payne,* 43 Colo. 184, 95 Pac. 301; *Alamosa Creek C. Co. v. Nelson,* 42 Colo. 140, 148, 93 Pac. 1112.

In this connection we notice the claim on the part of defendant company that the testimony established that

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the water diverted could not have reached the headgate of the plaintiff. The defendant company did not interpose any defense presenting this issue.

The defendants filed a motion to change the place of trial to the District Court of Larimer County, based upon the ground that the action was in tort, which according to the allegations of the complaint was committed in that county. The motion was overruled and error is assigned on this ruling. After the motion was denied the defendants answered and went to trial on the merits. This precludes them from questioning the order of the trial court in denying the motion to change the place of trial.—*O'Rourke v. O'Rourke, ante,* 300, 144 Pac. 890.

The remaining question urged on behalf of the defendant is not covered by any assignment of error.

The judgment of the District Court is affirmed.

Judgment affirmed.

Decision *en banc.*

Mr. JUSTICE HILL concurs in the conclusion.

Mr. JUSTICE WHITE, and Mr. JUSTICE GARRIGUES dissent.

Mr. JUSTICE GARRIGUES dissenting.

I cannot agree with the majority opinion.

1. The South Platte river and tributaries constitute water division No. 1. Water District No. 2 begins at the mouth of Cherry Creek on the South Platte river and extends to the mouth of the Cache la Poudre. Water District No. 1 begins at the mouth of the Poudre and extends to the east line of Morgan county. Water District No.

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64 begins at the east line of Morgan county and extends to the Colorado and Nebraska state line. The Big Thompson river—Water District No. 4, empties into the Platte in water district No. 2. The Greeley and Loveland Irrigation Company owns an irrigating system in Larimer county, supplied by the Big Thompson river in Water District No. 4, consisting of the Greeley and Loveland canal, a reservoir called Lake Loveland, the Barnes ditch used as an inlet from the river to fill the reservoir, and an outlet ditch to the canal. The headgate of the canal is about 26 miles above the junction of the Thompson with the Platte. The canal has a decreed priority of appropriation for irrigation, dating April 1, 1881 for 297.44 cubic feet per second. In irrigation, the water is either diverted directly from the river into the canal headgate or drawn from Lake Loveland through a short outlet from the reservoir into the canal. By means of this system, water can be diverted from the river into the canal either through the Barnes ditch and Lake Loveland, or directly into the canal from the river, without passing through the Barnes ditch and the reservoir.

The Farmers Pawnee Ditch Company owns an irrigating canal having a decreed priority of appropriation for irrigation of 150 cubic feet per second from the South Platte river in Water District No. 64, of date June 22, 1882. The headgate of this canal is about 175 miles on the Platte below the headgate of the Greeley and Loveland canal on the Thompson. The afternoon of June 21, 1911, when both canals were needing all their decreed rights for direct irrigation, there occurred on the water shed of the Big Thompson a rain storm of unusual violence called a cloudburst, which greatly swelled the stream and flooded the country to such an extent that many of the ditches on the Big Thompson were flooded and broken, or their headgates washed out, so that they

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were unable to draw water. This caused an unusual spurt or flood of water to come down the stream between six and seven o'clock that evening, which lasted only throughout the night, and the next day the water in the stream was normal. Under these conditions the Water Commissioner on the Thompson—defendant Kelley—authorized and permitted the Greeley and Loveland canal to take and divert from the river, through the Barnes ditch, and run into the reservoir, during the flood, 200 cubic feet per second for about twelve hours, amounting to 10,500,000 cubic feet of stored water. July 26, 1911, the Pawnee Company, defendant in error, brought this action at Sterling in Logan county in the Thirteenth Judicial District, against the Greeley and Loveland Irrigation Company, Charles W. Comstock as State Engineer, Filmore Cogswell as Division Engineer, and H. H. Kelley as Water Commissioner of Water District No. 4, in which it alleged it owned and was entitled on its irrigation priority of June 22, 1882, to the water in the stream which the defendant company stored in the reservoir through the Barnes ditch on the night of the flood; that the irrigation company wrongfully stored the water when plaintiff needed it for direct irrigation, and asked for a mandatory injunction commanding the irrigation company to draw the stored water from the reservoir and redeliver it into the Big Thompson river for the use of plaintiff, and that the official defendants see, as police officers of the stream, that it is conveyed to plaintiff's headgate for its use, and for a permanent injunction restraining the irrigation company thereafter from ever diverting, for storage, water from the Thompson, when there is not enough flowing in the South Platte river opposite plaintiffs headgate to supply its decreed priority for irrigation. August 3, 1911, defendant filed a petition for a change of the place of trial as follows:

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"Come now the defendants and move the court to change the place of trial of said action from the District Court of Logan County to the District Court of Larimer County, Colorado, and for grounds for said motion say:

That the county designated in the complaint is not the proper county for the trial of said action, and that the same should be changed to the District Court of Larimer County, for that it appears from the complaint herein that the cause of action arose in Larimer County, that the subject matter of the action is properly located in Larimer County. That it further appears from the complaint that the cause of action and the relief prayed is of and concerning property in Larimer County. That defendants and none of them are residents of Logan County. That none of the defendants were served in Logan County. That the defendant H. H. Kelley is a resident of Larimer County and was served with summons in Larimer County, all of which appears from the complaint, returns of service and the affidavit hereto annexed."

The application was denied, and defendant filed an answer in which it admitted storing the water, and alleged the irrigation company was in need of, and entitled to divert all the water of its decreed priorities for irrigation; that the checks in its canal, when the flood came suddenly, were arranged to carry and distribute 133 feet to its consumers which, owing to the low stage in the stream was all the water it was able to obtain; that on account of the suddenness of the flood, its short duration, and time of night when it occurred, it was not practical to arrange or rearrange the checks in the canal in time to economically and properly distribute from the canal the additional water to which it was entitled, and for the purpose of conserving and utilizing the water to which it was entitled, and needed,

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it diverted, while the flood lasted, through the Barnes ditch, into the reservoir, with the permission and under the authority of defendant Kelley as Water Commissioner, 200 feet per second of its decreed priority, for about 12 hours to be used shortly thereafter by it for irrigation. These are facts regarding which there is no dispute. The court entered a decree restraining the Greeley and Loveland Irrigation Company until August 15, 1911 from discharging this water from the reservoir, and commanding it on that date to discharge the water from the reservoir into the river, where it should be permitted by the official defendants, to flow down the streams to the headgate of plaintiff's ditch for the use of plaintiff.

2. Plaintiff's priority dated June 22, 1882. The Greeley and Loveland Irrigation Company has eight priorities aggregating 445.44 cubic feet per second. The first seven of these aggregate 148 feet and date from 1865 to 1878. The eighth priority is for 297.44 cubic feet and dates April 1, 1881, so that the last priority of defendant is one year two months and twenty-one days senior to the earliest priority of plaintiff. All the priorities of the defendant company are senior to any priority of plaintiff. Defendant was entitled to divert 445.44 cubic feet when it could get it and needed it, before plaintiff was entitled to divert any. If all the decrees in all the Water Districts of division No. 1 should be enforced as a whole, or as one decree, all defendant's priorities in district No. 4 on the Thompson would be senior, and would have to be supplied prior to, any appropriation of plaintiff in district 64, on the Platte. The low stage of the river made it impossible for defendants to divert more than 133 feet on its decree. It demanded and needed and would have taken all its water, but could not get more, because it was not in the stream. The tem-

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porary checks in the canal were arranged to distribute and the lateral headgates set to receive this 133 feet, not because they did not need all the appropriation, but because it was all they could get. Both canals were needing and would have used their full appropriations if they could have been obtained. Plaintiff contends that notwithstanding the seniority of the decreed priorities of the Greeley and Loveland canal, and the need of its consumers for all the water, and its prior right to divert the water for irrigation, still defendant had no right to run the water, even temporarily into a reservoir and store it there, to be shortly thereafter used, at a time when plaintiff was needing it for direct irrigation.

The question presented is, was the Greeley and Loveland canal lawfully entitled on its decreed priority of April 1, 1881 as against plaintiff's decreed priority of June 22, 1882 to divert this water from the stream when needed by its consumers for irrigation? If so, then defendant had a right to divert it when needed by its consumers for irrigation, which right was limited to the time and in the volume which it was entitled under the decree to divert for irrigation. The fact that it chose to temporarily store in a reservoir, to better conserve the use of the water for irrigation, was no injury to plaintiff, and deprived plaintiff of no vested right of seniority it had in and to the water as against defendant. As between these irrigating canals, the Greeley and Loveland was entitled to the water because of its prior decreed right for irrigation, and it could have raised its headgate and ran all the water into its canal if it chose, and plaintiff could and would not have made any complaint. The complaint is, that instead of running it into the canal, as it had a right to do, it ran it into the reservoir, which it had no right to do. Because it preferred from the standpoint of expectancy, to store temporarily in the

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reservoir, the water it needed and could have taken and was entitled to, affords no ground of complaint on the part of plaintiff. Defendant's consumers were suffering for this water, and because they thought they would derive more good, or could make a better economical use out of the water, by storing rather than running it into the canal that night, is no concern of plaintiff, because it deprived plaintiff of nothing to which it was entitled. The water was not run into the reservoir in an amount, or at a time when defendant had not the right to divert it for irrigation. Plaintiff admits defendant had the right to divert the water from the stream, but contends it had no right to put it in the reservoir. Because defendant believed it would derive more benefit from the water to run it into the reservoir, and conserve it to a greater economical use in the irrigation of crops, is no concern of plaintiff, and no argument against its right to divert the water from the stream.—*Irrigation Co. v. Reservoir Co.*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123; *Colorado M. & E. Co. v. Irrigation Co.*, 26 Colo. 47, 56 Pac. 185; *Seven Lakes Co. v. Irrigation Co.*, 40 Colo. 382, 93 Pac. 485, 17 L. R. A. (N. S.) 329.

In *Cache la Poudre Irrigation Company v. Larimer and Weld Reservoir Company*, 25 Colo. 144, 53 Pac. 318, 71 Am. St. Rep. 123, the Dry Creek Ditch Company, a mutual corporation, owned the Jackson ditch, which irrigated land north of the river and northwest of Fort Collins, and the Larimer and Weld Reservoir Company owned a reservoir called Terry Lake. The Reservoir Company bought stock in the Dry Creek Ditch Company, and ran the water represented by the stock through the Jackson ditch, thence down Dry Creek, from which it was diverted and stored in the reservoir. In the late irrigation season it drew the water from the reservoir into the Eaton canal, and distributed it to its consumers

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around Eaton in Weld county. The lower court enjoined this use of the water. We reversed the judgment and sanctioned and upheld the storage as lawful. True, the question there was over an enlarged use, and the right to store was not directly involved, but the court recognized the right and never questioned it.

In *Colorado Milling and Elevator Co. v. The Larimer and Weld Irrigation Co.*, 26 Colo. 47, 56 Pac. 185, the Milling Company owned a flouring mill at Fort Collins on the banks of the Poudre river, operated by water power through a mill race from the stream. The Irrigation Company's canal—the Eaton canal—had a decree for irrigation, senior to the decree of the mill race for power. The headgate of the canal was above the headgate of the mill race. During the summer the mill race had no difficulty in obtaining sufficient water, for the reason that irrigation priorities below the mill race were in part senior to the Eaton canal. In the winter time it required all the water of the stream to supply the mill with power. Things ran along this way without any serious trouble until the Irrigation Company built a large reservoir on the plains, called the Windsor reservoir, and began storing water during the winter season when there was no irrigation, diverting it through the Eaton canal on its irrigation decree, which antedated the decree of the mill race, which prevented the mill from operating by water power. The question involved was whether the Irrigation Company by diverting the water in the winter time for storage had so changed the use decreed the canal for irrigation as to injuriously affect the right decreed the mill race for power. There was no question but what during the summer irrigation season, the Eaton canal had the senior right. The lower court held that because the general decree of the canal for irrigation was senior to the mill race decree for power,

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that the canal could divert and store the water during the winter season at a time when it was not needing or using it for irrigation. The opinion reversing the case was written by Mr. Justice Gabbert, in which the court said the Irrigation Company could not make any use of the water which would result in a diversion in excess of the volume decreed the canal, or at a time when the water was not needed for the use for which it was appropriated; that a new question arose for determination upon the evidence respecting the time and use of the appropriation; that though the right of the canal to divert for irrigation was settled by the decree, it could not change the exercise of the right, measured either by volume or time, in such a manner as to deprive the mill race of its priority "or, otherwise expressed, if the rights of the parties alone depended upon the decree, then, although the Irrigation Company could change the use of its appropriation from irrigation to that of storage, it could not divert water for that purpose, which would result in a diversion measured by either volume or time, to the damage of plaintiff (the Milling Company), but when the water of the stream was needed by plaintiff to supply its appropriation, defendant (the Irrigation Company) would be limited to a diversion for storage, at such time and under the same conditions which would permit it to divert for irrigation purposes; for unless so limited, it could divert for storage to the injury of the priority of plaintiff, which, though junior to that of the irrigation company, is entitled to be protected against any use by the irrigation company which would result in depriving it of the use of water different from that following a diversion by the irrigation company for irrigation purposes." While the exact question of the right of the Irrigation Company to store temporarily the water in an amount and at a time when it would be entitled to divert

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it for irrigation, was not directly involved, still the case in effect holds that while the Irrigation Company could not store the water in the winter time, on the irrigation decree, still it could store the water during the summer or irrigation season for irrigation, limited in conditions to the volume and during the time it would be permitted to divert the water for irrigation.

It was not until the case of the *Seven Lakes Reservoir Co. v. The New Loveland and Greeley Irrigation and Land Co.*, 40 Colo. 382, 93 Pac. 485, 17 L. R. A. (N. S.) 329 that the question was squarely presented before the court. This case is important also because two of the same ditches, the Greeley and Loveland canal and the Barnes ditch, are involved. Burton D. Sanborn organized the Seven Lakes Company, which constructed and owned the Seven Lakes reservoir. The ranches including the site of the Seven Lakes, were farm lands, irrigated from the Louden and Barnes ditches. In purchasing these sites and adjoining lands for the reservoir, the company bought the water which had been used for their irrigation, from the Louden and Barnes ditches, and ceased to use the water upon these lands; stored it in the Seven Lakes reservoir during the flood time or earlier part of the irrigation season, for use in the latter part of the irrigating season. The water was drawn from the reservoir and conveyed by an outlet into the Greeley and Loveland canal, and distributed to its consumers and used for the irrigation of rowed crops such as beets, potatoes, beans and corn. The precise and only question involved was the right to store for later irrigation use, in the reservoir, priorities decreed to the Barnes and Louden ditches, during the irrigating season, at a time when the water was needed for direct irrigation. The right is upheld in an opinion written by Mr. Justice Gabbert, wherein the court said:

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"Appellant, (Seven Lakes Reservoir Company) owns certain rights to the use of water which, prior to its purchase, had been directly applied to the irrigation of lands. Instead of continuing to so use this water, it has ceased its direct application during the period it was theretofore applied, and stores the water, which it would have the right to thus apply, for use later in the same season. This change is in no manner detrimental to the rights of the appellee. It is not thereby deprived of any water which it would have the right to divert and apply to lands during the irrigating season as against the rights of the appellant. By the change no greater burden is imposed upon the common source of supply of the respective ditches. It must therefore, logically follow, that the appellant is entitled to divert the water represented by its purchase, and store for use later in irrigating crops, measured by volume and time, which it would have the right to apply directly to lands for purposes of irrigation at the time of such diversion. * * * Appellant is not asserting any right to the water in controversy by virtue of any appropriation for reservoir purposes, but is merely seeking to utilize priorities which it is conceded it is entitled to for direct irrigation purposes by storing the volume to which it is thus entitled for use at a later period. We are of the opinion that the appellant is entitled to so utilize these priorities; that is to say, entitled to store, during the direct irrigation season, the quantity of water, measured by volume and time, which it would be entitled to divert during that period for the purpose of direct irrigation."

The cases are as much alike as two peas, and yet the majority opinion of the court written by the same judge, never even mentions it.

3. The Greeley and Loveland Irrigation Company learning that certain state water officials in Denver

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threatened to draw the disputed water from the reservoir back into the stream, brought an action at Fort Collins, in the District Court of Larimer county against Comstock as State Engineer, Cogswell as Division Engineer, and Kelley as district Water Commissioner, to enjoin and restrain them from committing the act threatened. Thereupon the State and Division Engineers informed the court that the impounded water was claimed by canals down the river in Water District No. 1, in whose behalf they were acting in threatening to turn the water out, and whose priorities were senior to the Greeley and Loveland canal; and, at their suggestion, the court ordered that the adjudicated ditches of Water District No. 1, be made parties, which was accordingly done. Upon issue joined, the state water officials and the ditches in district No. 1, being defendants on one side of the controversy and the Greeley and Loveland Irrigation Company, plaintiff, on the other, the cause was tried to the court. It found in favor of the Greeley and Loveland Irrigation Company; that it had rightfully stored the water in dispute, and was the owner thereof, and July 19, 1911, it entered a final decree forbidding, enjoining and restraining the official defendants from in any manner interfering with the disputed water in the reservoir, or from turning any of the water stored therein from the reservoir. A week later, July 29th, the Pawnee Company, whose ditch lies in water district No. 64, lower down the stream, instituted this suit at Sterling, in the District Court of Logan county. The answer of the Greeley and Loveland Irrigation Company pleaded the fact of the former suit at Fort Collins as a defense; and the records, pleadings, evidence and decree in the former suit were introduced in evidence. The only difference in the two suits was the transposition of parties, and this was immaterial; the water users in water district No. 64,

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taking the place of the water users in water district No. 1. The entire proceedings in the former suit were brought before the court, showing that the transaction complained of, subject matter, issues joined and relief sought in both cases were identical. Notwithstanding this, the court entered a mandatory decree, diametrically opposed to the former decree of the District Court of Larimer county, commanding that the disputed water be discharged from the reservoir into the Big Thompson river, and permitted by the official defendants to flow down the stream to plaintiff's headgate for its use. This presents the anomalous position of the District Court of the Thirteenth Judicial District commanding the state officials to do a thing which the District Court of the Eighth Judicial District forbade them doing. The suit was brought apparently upon the theory, that the Pawnee Company not being a party to the former action, the doctrine of *res judicata* did not apply. That may be true. It was not pleaded for that purpose. Nobody claims it was *res judicata.* It was to show the abuse of jurisdiction by the District Court at Sterling in entertaining the case at all. The identity of the actions was such that it was an abuse of discretion for the District Court of Logan county to entertain jurisdiction and enter a decree commanding the doing of the identical thing which the District Court of Larimer county had forgotten. A *nisi prius* court should not disregard the former decree of a court of concurrent jurisdiction, in an action where the issues are identical and adjudicate over again the same transaction, involving the identical subject matter and relief, and enter a conflicting decree. This is especially true in injunction in mandamus. The mandatory writ of injunction in this case performed the duties of a writ of mandamus and it was in effect such a writ. In High on Extraordinary Remedies, at section 23, it is said:

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"The rule is well established that the writ will not be granted to compel the performance of an act which has been expressly forbidden by an injunction in the same court or in another court of competent jurisdiction, or whose performance would be in direct violation of an existing injunction, even though the person seeking relief by mandamus is not a party to the injunction suit. Courts will not compel parties to perform acts which would subject them to punishment, or which would put them in conflict with the order or writ of another court, nor will the court in such cases, to which application is made for a mandamus, inquire into the propriety of the injunction. And when it appears by the record that the respondent is already enjoined in the same court from performing the act sought, and the injunction suit will determine the question involved, a mandamus will not be granted." By the decree in the former suit, the water officials were enjoined from in any manner interfering with this impounded water; by the mandatory writ of the District Court of Logan county, they were commanded to do the act formerly forbidden. The former decree forbade activity, the latter commanded it in performing the act forbidden. When the court's attention was called to the proceedings and decree entered in the District Court of Larimer county, it should have declined to entertain jurisdiction, and not so to do was an abuse of discretion.

4. The petition to change the place of trial to Larimer County should have been granted. Chapter 2, concerning the place of trial of civil actions, Code 1887, was amended in 1905, by adding the following section:

"Sec. 25A. All actions affecting property, franchises or utilities, whether by foreclosures, appointment of receivers, or otherwise, shall be tried in the county where such property, franchise or utility is situated, or

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in the county where the greater part thereof is situated. And it shall be the duty of the court, upon application of any party to the action or interested in the subject matter at once to transfer any case to the county in which such property, franchise or utility is situated. After the application is made, the court shall have no jurisdiction, except for the purpose of entering the order of transfer."

Session Laws 1905, 166.

This section provides that all actions affecting property whether by foreclosure, appointment of receivers or otherwise, shall be tried in the county where it or the greater part thereof is situated. A priority of appropriation to divert water flowing in a natural stream has been declared by us to be one of the most valuable property rights known to the law, and surely water that has been captured over night, and stored in a reservoir to be used shortly after, for irrigation, is at least of equal dignity. The reservoir, including the water stored therein, was property. The complaint alleged that about June 21, 1911, defendant company, when plaintiff was needing the water, unlawfully diverted from the stream through the Barnes ditch into the reservoir, fourteen million cubic feet to be shortly drawn off into the Greeley and Loveland canal and distributed to its consumers; that plaintiff needs the water for irrigation, and the conduit from the reservoir is such that it can be turned into the stream and carried down the stream to plaintiff's headgate. The prayer of the complaint is that the water, by the restraining order, be retained in the reservoir pending the suit and on final hearing be discharged back into the stream and permitted to flow down the river for diversion into its canal, and that the official defendants be commanded to assist and aid in carrying out this decree, and alleges they are made defendants for the purpose of enforcing the delivery of this water to plaintiff. The decree is as broad as the complaint.

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The action affects property. Drawing water from the reservoir and redelivering it to the stream, to that extent would deplete the reservoir and deprive its consumers of the use of the water for irrigation. In such a case, the code provides the action shall be tried in the county where the property is situated. This action was brought in Logan county where the plaintiff resided, and against defendants, none of who resided or were served in Logan County. Defendant's reservoir, ditches and headgates are in Larimer county; the decree operates upon a reservoir and waters stored therein, in Larimer County, the official residence of the Greeley and Loveland Irrigation Company, and none of its property are in Logan county. The code further provides that any case against a public officer, for any act done by him by virtue of his office, or for failure to perform, shall be tried in the county where the cause arose. This cause, if any, arose in Larimer county by reason of defendant Kelley in his official capacity as Water Commissioner in Water District No. 4, authorizing and permitting the Irrigation Company to raise its headgate in Larimer county during a flood, and divert the water into the reservoir in Larimer county, in which county he resided and was served with summons. The other official defendants were served at their residence in Denver county. The injury complained of against the official defendants, grows out of an official act by Kelley as Water Commissioner in Water District No. 1, performed in Larimer county. Under all these circumstances it is clear to me the motion to transfer the case to Larimer County for trial, should have been granted, irrespective of the conflict of jurisdiction, and the court lost jurisdiction over the case when the motion was interposed, except to enter an order transferring it to the proper county for trial.

5. Aside of any the foregoing matters, I am con-

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vinced the decree of the lower court is inherently and fundamentally wrong. This water was stored in the reservoir on the 21st of June. The court ordered it retained in the reservoir until the 15th of August and then drawn off and delivered to a ditch 175 miles down the river, with no interest whatever or right in the reservoir. The proceeding was converted into a trial over the rights of property, and the court found that a specific amount of water stored in the reservoir belonged to the plaintiff, not by reason of any interest it had in the reservoir, but because of an irrigation ditch priority in water district No. 64. I cannot bring myself to believe that water running in a natural stream belongs, on account of an adjudication decree, to anyone to the extent that should the River Commissioner when policing the stream err in judgment in distributing the water, and permit it to be diverted into a reservoir, for use shortly thereafter for irrigation, when it should have gone to some ditch for direct irrigation, that a court, even though it finds he made a mistake, should order the stored water to be held for a definite period in the reservoir and then turned into the river for the use of another person who has no right in the reservoir. River Commissioners, from the very nature of things must be allowed some discretion in the policing of streams, and at times have to meet and solve intricate and troublesome situations and mistakes are sometimes made both in law and fact in the distribution of water. It never was contemplated that these mistakes should be corrected in this manner, and the stored water delivered to another whom the court afterwards finds was entitled to divert it for direct irrigation.

Decided January 4, A. D. 1915. Rehearing denied February 1, A. D. 1915.

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[No. 7723]

FARR v. THE PEOPLE.

1. PUBLIC OFFICER—*Liable for Public Moneys Unlawfully Received.* The State Game and Fish Commissioner is liable to the people for moneys paid by the Treasurer to reimburse him the expense of journeys made without the state, in attending conventions; and this, although the money was paid upon the auditor's warrant, issued upon a voucher approved by the Governor. (484)

2. VOLUNTARY PAYMENT—*Of Public Moneys, Unlawfully Made,* though with full knowledge on the part of the public officials conniving at the payment, may be recovered. (484)

The liability of the State Treasurer is no answer to the action. (484)

3. STATE AUDITOR—*Approval of Unlawful Claim—Effect.* The auditor's allowance of an unlawful claim upon the State Treasury is no bar to an action by the State to recover the payment. (484)

Error to Denver District Court.—Hon. GREELEY W. WHITFORD, Judge.

Messrs. MELVILLE, SACKETT & CALVERT, for plaintiff in error.

Hon. FRED FARRAR, Attorney General and Mr. PHILIP W. MOTHERSILL, for The People.

Mr. JUSTICE HILL delivered the opinion of the court:

This action was to recover between five and six hundred dollars paid by the State Treasurer during 1907 and 1908 to the plaintiff in error, while State Game and Fish Commissioner. The items disclose that this money was to reimburse him for expenses of trips taken outside of the state while attending certain conventions at Washington, D. C. and Yellowstone Park. The complaint discloses that the vouchers for these bills had been approved

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by the then governor, and were accepted by the auditor, who issued warrants therefor, which were paid by the treasurer. The plaintiff in error demurred to the complaint. The demurrer was overruled. He declined to plead further and judgment was entered against him. He brings the case here for review.

It is not claimed that these items constitute any lawful claim against the state, or that the plaintiff in error was legally entitled to this money. To recapitulate counsels' argument, it is that the demurrer should have been sustained for three reasons: First; because the State Treasurer is made absolutely liable for all moneys coming into his hands, and therefore if any is illegally paid out, the remedy of the state is exclusively against him. Second: the rule that where money is paid with knowledge of all facts, it cannot be recovered, applies to transactions between the state and an individual, the same as between individuals. And third; that as the auditor has been designated to pass upon claims of the executive department, his findings are final unless reviewed by direct court proceedings, and the fact that these items were for expenses incurred while traveling without the state, in nowise deprived the auditor of jurisdiction to pass upon their correctness and validity, for which reason the payment of such claims by the treasurer is a legal payment in the sense that it cannot be recovered.

The principles involved in each of these reasons have, by this court, been decided adversely thereto. The first, in *McClure v. La Plata County,* 19 Colo. 122, 34 Pac. 763; *Wilson v. People,* 19 Colo. 199, 34 Pac. 944, 22 L. R. A. 449, 41 Am. St. Rep. 243; *Sauer v. Town of Nevadaville,* 14 Colo. 54, 23 Pac. 87; *State v. Walsen,* 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; *Gartley v. People,* 28 Colo. 227, 64 Pac. 208.

The second, in *Roberts v. The People,* 9 Colo. 458,

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13 Pac. 630; *Ward v. Town of Barnum,* 10 Colo. App. 496, 52 Pac. 412; *County Commissioners v. McLean,* 50 Colo. 602, 115 Pac. 525.

The third, in *Barnum, supra; People v. Spruance,* 8 Colo. 307, 6 Pac. 831.

Other cases holding adversely to counsel's contention are *Commonwealth v. Field,* 84 Va. 26, 3 S. E. 882; *City of Chaska v. Hedman,* 53 Minn. 525, 55 N. W. 737; *Luxora v. Jonesboro, L. C. & E. R. Co.,* 83 Ark. 275, 103 S. W. 605, 13 L. R. A. (N. S.) 157, 119 Am. St. Rep. 139; *Ellis v. Board of State Auditors,* 107 Mich. 528, 65 N. W. 577; *Cumberland County v. Edwards,* 76 Ill. 544.

The judgment is affirmed.

Affirmed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

[No. 7821]

CRAGHEAD v. MCCULLOUGH.

1. NEGLIGENCE—*Physician and Surgeon.* To adopt for the reduction of a fracture the methods generally recognized by the profession as proper, is not negligence. (487, 488)

Where a surgeon is employed to treat an injury the law implies, in the absence of any express agreement, a contract on his part that he will use reasonable and ordinary care to accomplish the purpose of his employment. (489)

The surgeon does not warrant a cure, and is not responsible for a failure not resulting from the omission, on his part, of ordinary care, or the want of ordinary skill. (489)

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The want of ordinary care is not established by the result alone, but must be shown by other evidence. (489)

The evidence examined and held sufficient to charge the surgeon with a failure to use ordinary care. (487, 490)

2. DAMAGES—*Evidence as to.* Action against a surgeon for negligence in reducing a fracture, by reason of which negligence a second fracture, and a second reduction, became necessary. The evidence held sufficient to warrant a verdict for one thousand dollars, and that such award was no evidence of passion or prejudice on the part of the jury. (490, 491)

3. ——*Excessive Verdict—Remittitur—Effect.* Plaintiff's voluntary remittitur of three hundred and fifty dollars from a verdict of one thousand dollars warranted, by the evidence, has not the effect to entitle defendant to a new trial. (491)

Error to Denver District Court.—Hon. JAMES H. TELLER, Judge.

Mr. JOHN T. BOTTOM and Mr. MILNOR E. GLEAVES, for plaintiff in error.

Mr. S. S. ABBOTT, for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Plaintiff in error (defendant below), a physician and surgeon, was employed by defendant in error (plaintiff below) to reduce a fracture of his collar bone. He brought suit to recover damages from defendant which he claimed to have sustained as a result of the negligence of the doctor in treating the fracture. At the conclusion of the testimony, the defendant requested the court to instruct the jury to return a verdict in his favor, which was refused. The jury returned a verdict for plaintiff in the sum of one thousand dollars. The defendant filed a motion for a new trial, based upon the grounds, among others, that the verdict was excessive and the result of bias and prej-

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udice; that the court erred in not directing the jury to return a verdict for the defendant; and that the verdict was against the law and the evidence. Pending the determination of this motion the plaintiff filed a remittitur in the sum of $350.00, in which it was stated, "leaving the verdict stand as six hundred fifty dollars." Defendant did not consent to this reduction of the verdict. The court denied the motion for a new trial, and ordered that judgment be entered in favor of plaintiff, and against defendant, in the sum of $650.00, which was accordingly done. The defendant brings the case here for review on error.

The negligence charged in the complaint is, that the defendant failed to use ordinary care in treating the fracture, by carelessly and negligently bandaging and placing the ends of the bone in such position that they overlapped by more than one inch, and causing them to be held in that position until they adhered and solidified. It appears from the testimony that the fracture was oblique; and that defendant is a physician, and surgeon of many years experience in the practice of his profession, and a graduate of a medical college. He testified that when called to treat the fracture he recognized its character and described the steps he took in treating it, which it is not practical to state in detail, as from the record it appears he illustrated the method employed by referring to his arm and otherwise, but briefly, his treatment consisted in putting the ends of the bone in place, and bandaging and holding the arm and shoulder in a position with the aid of a fulcrum, the object of this treatment being to prevent overlapping. All the surgeons called as witnesses who testified on the subject, stated, that the method defendant employed was the usual and proper one to treat an oblique fracture of the clavicle. Employing the method to reduce a fracture generally

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recognized by surgeons as proper is not negligence.—*McGraw v. Kerr,* 23 Colo. App. 163, 128 Pac. 870; *Williams v. Poppleton,* 3 Ore. 139.

The real question involved, however, is whether there is testimony from which it can be fairly inferred that the defendant did not use ordinary care and diligence in treating the fracture. Not in the sense, however, that he did not employ the proper method, but in setting it improperly and causing it to be held in that position until the fragments adhered and became solidified, or in not exercising reasonable care to ascertain whether they remained in proper position. He testified that he placed the fragments in proper position, and from time to time after setting the bone visited his patient, and found it in place, having made examinations for this purpose; that later the plaintiff came to his office, which was about three months after the bone was set, when he found, for the first time, that it was overlapping, and so advised him, and requested him to return in a couple of days when he would have another surgeon make an examination. This examination was made and plaintiff advised that an operation should be performed. Arrangements for this purpose were made but plaintiff did not keep his engagement, and went to another doctor for an operation. This doctor testified that he made an examination of the clavicle, found some deformity from what had evidently been an oblique fracture in which the fragments had slipped past each other and healed in that position, and that bone adhesion was practically complete. Other surgeons testified to the effect that at this time the shoulder of the plaintiff was pressed forward, and in such position that the bone interfered with respiration and deprived him of the use of his arm, and that his crippled condition was very apparent. The surgeon who performed the operation to which we will refer later,

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and also the doctor who assisted him, stated that in their opinion the defendant ought to have discovered earlier than he did that the condition of the fracture was not satisfactory; that the fragments were overlapping and that this condition could have been ascertained by the outline or the position of the shoulder. The plaintiff testified that after the defendant set the broken bone, he examined him from time to time and said he was doing fine, up to the time when he suggested that another surgeon should be consulted and an operation performed. He also stated that about one month after the bone was set he complained to the defendant that it hurt him to breathe, that defendant told him this was caused by the enlargement at the point of union which would bother him for a time, but would come out all right.

Without question, the fragments of the broken bone had not healed in a proper position, which had caused a deformity and condition which rendered the plaintiff a cripple, but counsel for defendant contend that there is not any testimony to establish that this condition was the result of negligence on the part of defendant. In the absence of a special contract, the law implies that a surgeon employed to treat an injury, contracts with his patient that he will exercise reasonable and ordinary care to accomplish the purpose for which he is employed. He does not warrant a cure and is not responsible for want of success, unless it results from a failure to exercise ordinary care, or from want of ordinary skill.—*Bonnet v. Foote,* 47 Colo. 282, 107 Pac. 252, 28 L. R. A. (N. S.) 136; *McGraw v. Kerr, supra; Leighton v. Sargent,* 27 N. H. 460, 59 Am. Dec. 388; *Patten v. Wiggin,* 51 Me. 594, 81 Am. Dec. 593. True, as stated in many well considered cases, the failure to exercise ordinary care in treating a fracture is not established by proof of the result alone, but must be shown by other evidence. Other

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evidence that the condition of plaintiff, bearing on the question of negligence in treating the fracture was introduced. Surgeons testified that the position of the fragments ought to have been discovered by defendant while treating the plaintiff; that an examination would have disclosed the overlapping, and that the position of the shoulder indicated that the fracture was not healing in the proper position. The plaintiff also testified that he complained to the defendant about one month after the bone was set, that it hurt him to breathe, which from the testimony of the physicians, must have been caused by the clavicle not being in a proper position. So that there is substantial testimony from which to deduce one of two conclusions, either the defendant did not place the fragments in proper place in the first instance, or, if he did, he failed to exercise ordinary care from time to time to ascertain whether they remained in place and in keeping them in proper position.

It is next urged that the verdict was excessive and the result of bias and prejudice, and, for this reason, it should have been set aside, and a new trial granted. That an operation was necessary in order to relieve plaintiff from the condition he was in as the result of the overlapping of the fracture, must be conceded. The surgeon performing this operation testified that he made an incision down to the bone, and then by the use of instruments re-fractured it where the union had taken place, made a hole in each fragment and inserted a silver wire, and wired the bones together so that they would remain in place and prevent overlapping until a new union was effected. Considering the pain and suffering, expense and loss of time which this operation necessarily entailed, and also the fact that there was sufficient testimony from which it could be inferred that defendant had not exercised the degree of care the law required

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in treating the fracture, it cannot be said that the verdict was excessive or in any sense the result of bias or prejudice. Counsel, however, contend that in an action to recover for a tort, the court cannot reduce the verdict of a jury merely because it is excessive, and that the only remedy in such case is to set the verdict aside and grant a new trial. It is also contended that where the amount awarded is so excessive as to be accounted for only on the ground of passion or prejudice on the part of the jury a remittitur will not cure the error, as such passion or prejudice will be deemed to have influenced the jury in determining the issues of fact. In the circumstances of this case neither proposition is applicable. The trial judge did not find that the award of one thousand dollars was excessive. He did not direct that the verdict would be set aside unless the plaintiff consented to remit the sum of $350.00. The reduction was voluntary on the part of plaintiff. There is ample testimony to sustain the findings of the jury that defendant was guilty of negligence. The testimony is sufficient to sustain the award of the jury. So that the record does not disclose that the jury were influenced by either passion or prejudice in finding the facts in issue in favor of plaintiff, or in making the award they did, consequently, the defendant was not prejudiced by the remittitur, and hence cannot complain.

Error is also assigned in ruling out testimony sought to be introduced on the part of defendant. This testimony was in no sense pertinent to any issue in the case and was therefore properly excluded.

Complaint is made that by instructions requested and given, the jury were prevented from considering contributory negligence on the part of plaintiff. The testimony did not tend in any manner to establish negligence of the plaintiff. It is also urged that instructions

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given speak of want of skill of the defendant which was not an issue in the case. The objection is without merit. The method employed to reduce the fracture was proper, but there was testimony tending to prove that defendant, either from want of ordinary skill or through failure to exercise reasonable care, did not properly set the fracture in the first instance, or failed thereafter to discover that the fragments were not in place, and keep them in proper position.

The judgment of the District Court is affirmed.

Judgment affirmed.

Mr. CHIEF JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

Decided January 4, A. D. 1915. Rehearing denied February 1, A. D. 1915.

[No. 8114]

DILLON ADMINISTRATRIX v. MYERS ET AL.

1. CORPORATIONS—*Manufacturing—Mortgage of Plant Without Consent of Stockholders—Effect—Statute Construed.* Section 865 of the Revised Statutes was intended for the protection of the stockholders, and not of the public. Where the stockholders make no objection to the action of the directors, subsequent creditors of the corporation will not be heard to complain. The opinion in *Carlsbad Co. v. New*, 33 Colo. 389 is not authority for the opposite conclusion. (499, 508)

The provision of the statute prohibiting the encumbrance of the plant does not concern the public at large. No principle of public policy is involved; no wrong is done to any human being by an encumbrance made without the consent of the stockholders, save to

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the stockholders themselves; as others are not concerned they have no right to avail themselves of the irregularity. (499)

2. ——*Ultra Vires.* A contract fully executed will be allowed to stand though beyond the powers of the corporation. (502)

3. STATUTES—*Construction—Void or Voidable.* Void, in a statute intended for the protection of a particular class construed to mean voidable, and only at the instance of those of the protected class. (498, 499)

Error to El Paso District Court.—Hon. JOHN W. SHEAFOR, Judge.

Mr. ROBERT KERR, for plaintiff in error.

Mr. FRANKLIN E. BROOKS, and Mr. MICHAEL B. HURLEY, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The Rocky Mountain Can Company, a Colorado corporation, on the 5th day of March, 1908, borrowed from John K. Dillon the sum of $4,000, and thereupon executed and delivered to said Dillon its promissory note in that amount, and to secure the payment thereof, executed and delivered to the Public Trustee of El Paso county, its trust deed covering certain of its property, which trust deed was immediately filed for public record.

The note was payable two years after date. Interest payments were made for one year, but the corporation thereafter made default in its interest payments, and taxes, and as provided in the trust deed, and on the 19th day of October, 1909, the premises were sold at Public Trustee's sale. Dillon purchased the property at such sale for the sum of $4,291.91, being the amount due on the note, with interest and costs. Thereafter the Public Trustee issued his trustee's deed conveying the premises to Dillon. The proceedings in the foreclosure sale,

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and in the issuance of the deed, were in all respects regular. The contention of the defendants in error, is that the trust deed, so executed, was not only void, but wholly without effect, as against all persons, and that there can be no relief in equity to innocent injured persons, in such a case.

Before the execution and delivery of the trustee's deed, but after the expiration of the period for redemption, this action was instituted.

The complaint alleged in substance that the name of the corporation was changed, after the transaction with Dillon, to "The Rocky Mountain Manufacturing Company," and that on September 29, 1909, the plaintiffs, Myers and McDonald, obtained a judgment against the corporation in the sum of $2,186.03, and that a transcript thereof was on the following day, filed with the County Clerk and Recorder.

It is then alleged that the corporation executed and delivered the said trust deed unlawfully and without authority, in that such corporation was a manufacturing corporation, and the trust deed was made without the consent of the stockholders. The prayer was for the cancellation and annulment of the trust deed and all proceedings under it. Dillon died during the pendency of the action, and his widow, Florence A. Dillon, as administratrix, was substituted as party defendant.

It clearly appears that the transaction between the company and Dillon was in perfect good faith upon the part of Dillon at least. The sum of money which the trust deed was given to secure was received by the company and used by it in the conduct of its business, and in the improvement of its property. Neither the loan, nor the trust deed to secure it, was authorized at any meeting of the stockholders of the company. It appears that the officers of the company believed at the time, that

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the corporation had power under its charter to execute the trust deed, without the consent of the stockholders. Neither the corporation nor any stockholder thereof, has ever questioned, and does not now question, or object to the validity of the transaction.

The plaintiffs below, defendants in error, rely upon that portion of Section 865 Rev. Stat. 1908, as follows:

"The board of directors or trustees of a mining or manufacturing corporation shall not have power to encumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant until the question shall have been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property, without such consent shall be absolutely void, and the vote upon such proposition shall be entered on the minutes of the corporation."

The trust deed covered the building of the company erected for a proposed manufacturing plant.

1. The plaintiff in error, contends that the corporation was not a manufacturing corporation within the meaning of the statute, but on the contrary that its real purpose was to conduct a general real estate business, and with express power conferred by its charter, to do the very thing it did do in this instance.

The purposes for which the corporation was organized as recited in the articles of incorporation, are:

First:—To buy, sell, exchange, hold, own, acquire, and encumber real estate and personal property, to buy, sell, exchange, hold, own, acquire and encumber a certain invention for improvement in oil and gasoline cans under Latest Patent dated January 10, 1905, No. 779, 983, and any and all improvements that may be made to or upon said invention within the states of Colorado and Wyoming and the territory of New Mexico.

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Second:—To erect and operate manufactories for the purpose of manufacturing oil and gasoline cans, to sell and deal in said cans after the same are manufactured, to manufacture and sell said cans according to any improvements that may be made upon the invention hereinbefore mentioned.

Third:—To mortgage, encumber and pledge the real estate and personal property and privileges or franchises belonging to the said company, or any part thereof, for the funds with which to purchase real estate, erect buildings and manufacture and deal in said cans, and also for the purpose of acquiring other property.

Fourth:—To pay cash or issue full-paid and non-assessable stock for and in exchange for real and personal property, to manufacture and deal in other articles than the said cans hereinbefore mentioned, and to do a general manufacturing business, in other articles similar to said cans, and generally to prosecute, do and perform any and all business and to do any and all things that may in any wise be necessary, convenient, incidental and appurtenant, or either, to the powers, purposes or objects for which this company is organized; and to do and perform any and all other acts and things in connection therewith which a natural person might or could do, and which a corporation is not prohibited by law from doing, as the Directors of our said Company may deem expedient and proper.

The good faith purpose of the incorporators to engage in a legitimate manufacturing enterprise may be seriously questioned. The corporation was organized by a firm of real estate dealers. Its original capital stock authorized by the charter was $6,000, but before it transacted any business, this was increased to $300,000. The conduct of the corporation makes it appear to have been a promotion scheme pure and simple. Its first and prin-

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ciple operations were to trade its corporation stock for real estate of any kind, and located in no particular state or locality.

It manufactured none of the cans mentioned in the charter. Its manufacturing operations were confined to the plating of certain wares, for use in hotels and similar places, and the making of lamps, trays, etc., and this in a limited way. It contracted with the plaintiffs below for the right to manufacture iceless refrigerators, upon the basis of a royalty, and upon which plaintiffs seem to have had a patent, or some rights under a patent, and it is upon this contract that the plaintiffs obtained the default judgment upon which they rely, and which judgment was rendered after the company had failed, and its officers had left the county. But it did not manufacture any such refrigerators in its building, though it had some samples made by others. It constructed a large building and installed certain machinery, which latter seems to have been removed afterward, by those who sold it to the company, because of non-payment, and which machinery was never in operation. The whole scheme was plainly either in fraud, or it was an iridescent dream.

It may be assumed for the purposes of the case, but not decided, that the corporation was technically a manufacturing corporation, and that the building so encumbered was its plant. What has been said is for the purpose of throwing light upon the equities of the parties rather than to determine this question.

It will be seen that the trust deed was executed and recorded on the 5th day of March, 1908, and that plaintiff's judgment was rendered September 29, 1909, or about eighteen months afterward.

2. The question remaining to be considered is as to what are the rights of the parties under the state of facts presented, conceding the company to have been a manu-

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facturing corporation. The case of *Beecher v. Marquett Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695, involved a similar statute to ours. That was an action to foreclose a mortgage executed by a corporation without the consent of the stockholders, and the provision of the statute considered, was as follows:

"That no alienation, diversion, sale or mortgage of any or any part of the mine works, real estate or franchise of any corporation mentioned in the first section of this act shall have any force or effect, or pass any title thereto, or interest therein, unless expressly authorized by the vote of three-fifths in interest of the entire stock of said company actually present or legally represented at some meeting of stockholders called and notified."

Judge Cooley, the writer of the opinion, there said:

"Courts often speak of acts and contracts as void when they mean no more than that some party concerned has a right to avoid them. Legislators sometimes use language with equal want of exact accuracy; and when they say that some act or contract shall not be of any force or effect, mean perhaps no more than this: That at the option of those for whose benefit the provision was made it shall be voidable, and have no force or effect as against his interests. This was found to be the meaning in the mind of the legislature in enacting the Massachusetts usury law. It was declared in most positive terms that mortgages on usurious considerations should be 'utterly void;' but a consideration of its purpose; which was to protect debtors against the enforcement of unconscionable demands, made it clear that it never was intended that strangers to the title should be at liberty to question such a mortgage.—*Green v. Kemp*, 13 Mass. 515, (7 Am. Dec. 169). Mr. Justice Bayley in one case intimated that the word void in a statute might be construed voidable where the provision is introduced for the

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benefit of parties only, but not where it is introduced for public purposes and to protect those who are incapable of protecting themselves (*Rex v. Hipswell,* 8 B. & C. 466, 470), and though this distinction has been questioned (*Rex v. St. Gregory,* 2 Ad. & El. 99, 107), much good reason lies at the foundation of it. If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determine individuals who are *sui juris,* the purpose in sufficiently accomplished if they are given the liberty of avoiding it. A statute would strike blindly if the letter alone were to be regarded, not the spirit. A statute declares that certain indentures not made as by the statute provided should 'be clearly void in law to all intents and purposes;' and it was nevertheless held that, if acted upon, the apprentice gained a settlement thereby.—*St. Nicholas v. St. Peter,* Strange 1066. And in Ohio a purchase at a judicial sale by one who acted as appraiser of the property, though the statute declared it should be 'considered fraudulent and void,' was held to be voidable only on an interposition or proceeding by a party in interest, directly for the purpose of avoiding it.—*Terrill v. Auchauer,* 14 Ohio N. S. 80. This subject is considered at length and many authorities examined in *State v. Richmond,* 26 N. H. 232, to which we refer.

The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action after they have been notified of a proposal to do so, and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large; no principle of public policy is at stake; no wrong,

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direct or indirect, is done to any human being, if conveyance is made or mortgage given without the exact notice required unless it be a wrong to the stockholders themselves. And as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive? We are satisfied such was not its purpose."

The doctrine thus announced, has been adopted and the reasoning approved by text writers and by the courts, now in all jurisdictions, though the contrary has been held in some instance, notably in the earlier cases in *California Milling Co. v. Kennedy,* 81 Cal. 356, 22 Pac. 679; *McShane v. Carter,* 80 Cal. 310, 22 Pac. 178.

Counsel for defendants in error, cite *Williams v. Gaylord,* 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. 798. This was not the independent judgment of that court. The case arose in California and the decision was based upon the rule of plenary power of the state court, to construe a statute of the state, and it was therefore held that the case of *McShane v. Carter, supra,* was controlling in that case.

The Circuit Court of Appeals in the case of *Louisville Trust Co. v. Louisville N. A. & C. Ry. Co.,* 75 Fed. 433, 22 C. C. A. 378, Judge Taft speaking for the court said:

"Referring to the same proviso as that considered in the Zabriskie Case, the supreme court of New York, in *Connecticut Mutual Life Ins. Co. v. Cleveland, etc., R. Co.,* 41 Barb. 9-24, said that 'these provisos were intended for the protection of the shareholders, and relate rather, to the mode or manner of the execution of the power.' This view of the purpose and effect of such a provision is enforced by the construction put by the Supreme Court of the United States on a statute of Illinois much more emphatic and prohibitory in form than

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that here in controversy, in *St. Louis, etc., R. Co. v. Terre Haute, etc., R. R.*, 145 U. S. 393, 12 Sup. Ct. 953, (36 L. Ed. 748. The act there provided that it should not be lawful for a railroad company of Illinois to lease a railroad in another state without having first obtained the written consent of all the stockholders of said roads residing in the state of Illinois, and any contract for such lease made without having first obtained said written consent should be null and void. Of this, the supreme court, speaking by Mr. Justice Gray, said: 'Although this statute in terms, declares that any such lease made without the written consent of the Illinois stockholders, 'shall be null and void,' it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, and excess of which could not be satisfied by estoppel, but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time or otherwise, to deny.' Mr. Justice Harland, at the circuit, took the same view of a similar statute in *Harvey v. Railway Co.*, 28 Fed. 169, 174."

The court then quotes with approval the language of Judge Cooley in *Beecher v. Hill, supra,* heretofore cited. The principle announced in these cases has been recognized by this court. In *Denver Fire Ins. Co. v. McClelland,* 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, the court said:

"Corporations have the capacity to do wrong, and may overstep the limits placed by the law to their powers, and when they violate their charters in this respect their acts are illegal, but not necessarily void.—*Bissell v. Mich., etc., R. R. Co.*, 22 N. Y. 258. The plea of *ultra*

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vires is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons.

Bissell v. Mich., etc., R. R. Co., 22 N. Y. 258. Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpi.* But where the act is not wrong per se, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us."

The principle which would seem to control in the case at bar is admirably stated in the joint concurring opinion of Beck, C. J., and Helm, J., in that case.

It will be observed that there is a distinction usually made by the authorities, as between executory, and fully executed contracts, as applicable to the doctrine of *ultra vires.* It was said in *Fire Ins. Co. v. McClelland, supra,* that "The executed dealings of corporations must be allowed to stand when the plainest rules of good faith require."

It is said by Thompson in his work on corporations:

"It is a principle of universal application that whenever an illegal, immoral, or prohibited contract has been fully executed on both sides, the law will not lend its aid to either of the parties for the purpose of unraveling it and enabling him to recover what he may have lost

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through it. In such cases the governing maxim is, *in pari delicto, potior est conditio defendentis.* When therefore, a contract with a corporation, the making of which is beyond its granted powers, has been fully executed by both parties, neither of them can assert its invalidity as a ground of relief against it."—Thompson on Corp., Secs. 6023-6024.

It is said by Bouvier, vol. 2, 1153, under the title of *ultra vires;*

"There is said to be a tendency of the courts based upon the strongest principles of justice, to enforce contracts against corporations, although in entering into them they have exceeded their chartered powers, where they have received the consideration and the benefit of the contract; *Railroad Co. v. Howard,* 7 Wall. 392, 19 L. Ed. 117; *National Bank v. Matthews,* 98 U. S. 621, (25 L. Ed. 188); see *Campbell v. Argenta Co.,* 51 Fed. Rep. 1; *Shuman Co. v. Fletcher,* 46 Kan. 524, 26 Pac. 951; and the rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation became insolvent; 57 Fed. Rep. 47; *Chicago Co. v. Union Pacific Co.,* 47 id. 22. The doctrine of *ultra vires,* when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong; *Ohio, etc., Co. v. McCarthy,* 96 U. S. 258, 24 L. Ed. 693. The executed dealings of corporations should be allowed to stand for and against both parties, when good faith so requires; *Bissell v. Michigan, etc., Co.,* 22 N. Y. 258, 494; *Whitney, etc., Co. v. Barlow,* 63 N. Y. 62. Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains but the payment by the cor-

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poration of the consideration, it will not be allowed to set up that the contract was *ultra vires; Oil Creek, etc., Co. v. Pennsylvania Co.,* 83 Pa. 160. Corporations should be restricted so far as courts can, in the exercise of their powers, limit them; but the plea is not a gracious one, that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it."

The contract in the present case, between the company and Dillon, was fully executed. Clearly then under the rule thus stated, the company cannot raise the question of *ultra vires.* The plaintiffs below had knowledge of the transaction involved, at the time of their dealings with the corporation and upon which their judgment was obtained. They became creditors subsequent to the delivery and recording of the trust deed.

It is also held that where a corporation has waived or omitted to exercise the right to institute proceedings to recover lands, even in case of fraud, such right does not inure to the benefit of subsequent creditors or purchasers, clearly not in case of a good faith transaction.—*Graham v. Railroad Co.,* 102 U. S. 148, 26 L. Ed. 106. It has been held also, that one holding a valid second mortgage, not made expressly subject to an invalid mortgage, cannot maintain an action for the cancellation of the void mortgage, and thus to remove a cloud upon the title.—*Commonweath v. Smith,* 10 Allen (Mass.) 448, 87 Am. Dec. 672.

In *Gordon v. Preston,* 1 Watts 385, 26 Am. Dec. 75, it was said:

"Now the validity of this mortgage is unquestioned by the corporation, even at this day, though its existence has all along been known to the corporate officers whose duty it was to disavow it, had there been an intent to contest it. The corporation then being satisfied with

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it, who has a right to object? * * * Then, granting the defendant as a judgment creditor, to have succeeded to the rights and capacity of the corporation, his succession did not occur till after more than eight months from the performance of the act, during all which time the corporation was silent, though the absent members had notice of the mortgage by the minutes. At the period of the defendant's succession, then the time for objection had gone by, and if it had not, still even he was quiescent till about the time of awarding the issue in which the validity of the mortgage is drawn into question. To disaffirm it now, when every opportunity of obtaining any other security is lost, would be unconscionable; and the act, therefore, though originally unauthorized, must be taken to have been subsequently ratified." —*Campbell v. Argenta, G. M. Co.* (C. C.) 51 Fed. 1; *Head v. Horn,* 18 Cal. 211; *Boston & M. Copper Co. v. Montana Ore Purchasing Co.* (C. C.) 89 Fed. 529; *Beach & Weld v. Wakefield,* 107 Iowa, 567 (78 N. W. 688, 78 N. W. 197); *Tyrell v. Cairo & St. L. Ry. Co.,* 7 Mo. App. 294; *De Kay v. Voorhis,* 36 N. J. Eq. 37; *Commonwealth v. Smith,* 92 Mass. (10 Allen) 448 (87 Am. Dec. 672); *Boyce v. Montauk Gas & Coal Co.,* 37 W. Va. 73 (16 S. E. 501); Jones on the Law of Real Property in Conveyancing, § 153; Beach on Private Corporations, § 744.

We must hold therefore that the plaintiffs below have no right to maintain this suit in equity. In the comparatively recent case of *Westerlund v. Black Bear Mining Co.,* 203 Fed. 599, 121 C. C. A. 627, will be found a most careful and exhaustive review of the authorities upon this subject. This case had under consideration the Colorado statute. Two distinct propositions are there laid down, which seem irrefutable, either in reason or upon authority, and which we quote. The first of these is:

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"Another principle of law so firmly established as to be no longer debatable, is that an act or contract of a corporation, which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it. But an act or contract of a corporation which is within its general corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a third party or parties, is voidable only. Such an act or contract is valid, until avoided, not void until validated, and it is subject to ratification and estoppel.—*Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Campbell v. Argenta Gold & Silver Min. Co.* (C. C.) 51 Fed. 1, 8; *Zabriskie v. Cleveland, C. & C. R. R. Co.*, 64 U. S. (23 How.) 381, 398, 16 L. Ed. 488; *St. Louis V. & T. H. R. R. Co. v. Terre Haute & I. R. R. Co.*, 145 U. S. 393, 402, 408, 12 Sup. Ct. 953, 36 L. Ed. 748; *Boston & M. Con. C. & S. Min. Co. v. Montana Ore Purchasing Co.* (C. C.) 89 Fed. 529, 530; *Miners' Ditch Co. v. Zellerback,* 37 Cal. 543, 578, 99 Am. Dec. 300; *Bishop & Co. v. Kent & Stanley Co.*, 20 R. I. 680, 684, 41 Atl. 255; *Beecher v. Rolling Mill Co.*, 45 Mich. 103, 105, 108, 109, 7 N. W. 695; *Eastman v. Parkinson,* 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921, 928, 929, 932; *State v. Richmond,* 26 N. H. 232; *Rochester Savings Bank v. Averell,* 96 N. Y. 467, 471, 475; *Paulding v. Steel Co.*, 94 N. Y. 334, 341; *Boyce v. Montauk Gas & Coal Co.*, 37 W. Va. 73, 85, 16 S. E. 501; *Watts' Appeal,* 78 Pa. 370, 394; *Manhattan Hardware Co. v. Phalen,* 128 Pa. 110, 118, 18 Atl. 428; *Thomas v. Citizens' Horse Ry. Co.*, 104 Ill. 462, 467."

The second proposition is as follows:

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"But a corporation which has executed and accepted the benefits of a contract within the scope of its powers, that is neither wrong in itself nor against public policy, and that is defective only because in its execution the corporation has failed to comply with some legal requirement enacted for the sole benefit of third persons, is estopped to assail it, and the beneficiaries of the requirement alone may avoid it. Hence the stockholders of this corporation, and they alone, have the right to avoid this lease because they alone had any interest in a compliance with the legal requirement that they should assent to its execution.—*Hervey v. Midland Ry. Co.* (C. C.) 28 Fed. 169, 174; *In re New York Economical Printing Co.*, 110 Fed. 514, 519, 49 C. C. A. 133; *Rogers v. Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 304, 307, 314, 315, 316, 33 C. C. A. 517; *Beecher v. Rolling Mill Co.*, 45 Mich. 103, 108, 109, 7 N. W. 695; *Boyce v. Montauk Gas Coal Co.*, 37 W. Va. 73, 85, 16 S. E. 501; *Eastman v. Parkinson*, 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921, 928, 929, 930; *Campbell v. Argenta Gold & Silver Min. Co.* (C. C.) 51 Fed. 1, 8; *Wood v. Waterwoods Co.* (C. C.) 44 Fed. 146, 150, 12 L. R. A. 168; *St. Louis, etc., R. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 402, 408, 12 Sup. Ct. 953, 36 L. Ed. 748; *Antietam Paper Co. v. Chronicle Publishing Co.*, 115 N. C. 143, 145, 20 S. E. 366; *Alabama Iron & Steel Co. v. McKeever*, 112 Ala. 134, 145, 20 South. 84; *Bishop & Co. v. Kent & Stanley Co.*, 20 R. I. 680, 684, 686, 41 Atl. 255; *McKee v. Title Ins. Co.*, 159 Cal. 206, 113 Pac. 140; *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 433, 17 L. R. A. 375; *Barrett v. Pollak Co.*, 108 Ala. 390, 18 South. 615, 620, 54 Am. St. Rep. 172; Jones on Real Property, § 153; 2 Beach on Private Corporations, p. 1165, § 744."

It is contended by defendants that in the *Carlsbad Water Company v. New*, 33 Colo. 389, 81 Pac. 341, this

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court intended to and did adopt the doctrine of the early California cases. A consideration of that case discloses that the principal question was as to whether or not the Carlsbad Water Company, was a manufacturing corporation within the meaning of the statute. There are but two sentences contained in the opinion that may be said to have bearing upon the question here. These are:

"It was competent for appellant trustee to question the validity of the mortgage.—*In re Antigo Screen Door Co.*, 123 Fed. 249, 254, 59 C. C. A. 248; *McShane v. Carter*, 80 Cal. 310, 22 Pac. 178, 312; *Pekin Mining Co. v. Kennedy*, 81 Cal. 356, 22 Pac. 679. * * * For the reason above assigned—want of proper authority from the corporation for the execution of the mortgage—the same was void, and the following authorities sustain this conclusion.—*Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017; *Mannhardt v. Ill. Staats Zeitung Co.*, 90 Ill. App. 315; *McShane v. Carter, supra; Vail v. Hamilton*, 85 N. Y. 453."

There was no attempt to support either of these statements by reason, and with the exception of the now overruled California cases, the authorities cited do not in any sense support the contention of the defendant in error here.

The now uniform holding of the courts of this country, that the provisions of the statute were for the benefit of stockholders only, and that they alone, may question the validity of a transfer or encumbrance made in violation of the statute, was not raised nor argued in that case. The court of appeals in *Firestone Co. v. McKissick*, 24 Colo. App. 294, 134 Pac. 147, in distinguishing that case, speaking through Presiding Judge Cunningham, said:

"But it does not appear from the opinion that the point raised by Judge Sanborn in the Westerlund case,

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viz: that only the stockholders of the corporation, for whose benefit the section of the statute was passed, could invoke its provisions, was in any manner called to the attention of or considered by our supreme court in connection with the Carlsbad Water Company case. We have examined the briefs filed in the Carlsbad case, both the original briefs and those filed on rehearing, without being able to discover that this matter was even mooted in that case."

A further examination of the record and briefs in the Water Company case, fully justifies such statement. The sole question presented to the court was that of *ultra vires* because of the prohibition of the statute, and not as to whom may be entitled to raise that question. Clearly these statements of the law were made without sufficient consideration and without being properly before the court. While the bare statement by the court, that a trustee in bankruptcy may question the validity of the mortgage, was then sustained by the California case cited, that doctrine has since been repudiated by the supreme court of that state. In *McKee v. Title Ins. Co.*, 159 Cal. 206, 113 Pac. 140, the court said:

"He is not suing in behalf of the stockholders, or in their interest, and, there being no fraud, he stands in the shoes of the corporation with regard to the bonds. The corporation has received the money obtained by means of the bonds, and has applied it to the payment of its debts and the completion of the hotel. The money has thus inured to the benefit of the corporation and its stockholders, and of the general creditors also, since it has unquestionably given a substantial value to a structure which would otherwise be comparatively worthless. The corporation is therefore estopped to dispute the validity of the bonds and the creditors are likewise bound thereby. The real point of the objection is that the man-

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ner of issuing the bonds was so defective that the transaction was *ultra vires,* and void notwithstanding that the corporation received and holds the benefits thereof. In regard to a similar claim the New York court of appeals said: 'That kind of plunder which holds on to the property, but pleads *ultra vires* against the obligation to pay for it, has no recognition or support in the laws of this state.' (*Seymour v. Association,* 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859). The following cases declare that neither the corporation nor its creditors can, under like circumstances to those here existing and under similar provisions of the law, maintain such an attack on bonds irregularly issued, and that the provisions of such laws are for the protection of stockholders only.—*Anderson v. Bullock County Bank,* 122 Ala. 275, 25 South. 523; *Bishop v. Kent,* 20 R. I. 685, 41 Atl. 257; *Rochester Bank v. Averell,* 96 N. Y. 475; *Paulding v. Chrome Steel Co.,* 94 N. Y. 334; *In re New York Economical Pr. Co.,* 110 Fed. 519, 44 C. C. A. 133; *Hervey v. Ill. Midland Ry. Co.* (C. C.) 28 Fed. 174; *Manhattan Hdw. Co. v. Phelan,* 128 Pa. 110, 18 Atl. 428; *Wood v. Corry,* 44 Fed. 150, 12 L. R. A. 168; *Nelson v. Hubbard,* 96 Ala. 252, 11 South. 428, 17 L. R. A. 375; *Eastman v. Parkinson,* 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.) 921. In *Boyd v. Heron,* 125 Cal. 453, 58 Pac. 64, it was a stockholder who made the objection and it was in defense to a suit to enforce his individual liability as such stockholder. It comes clearly within the rule that the provision is for the benefit of stockholders and it does not conflict with the cases just cited."

The action in the Carlsbad case was to foreclose a mortgage executed by New, as vice-president of the company to Young as an individual, but who was at the time its president, and who transferred the mortgage to Maud New, wife of the vice-president, who instituted the suit.

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Both New and Young as the chief executive officers of the company and constituting a majority of its board of directors, must have been conclusively presumed to know of the absence of authority by the stockholders. Equity does not look with favor upon such a transaction.

One of the strongest claims for the interposition of equity in the case at bar, and others cited to sustain it, is that the mortgagee was an innocent party, acting in good faith and without knowledge of the failure of the corporation to comply with the term of the charter or statute. But a careful examination of the additional authorities cited by the court in the Carlsbad case, makes it plain that these do not support the conclusion contended for by defendants.

In re Antigo Screen Door Co., supra, the question whether or not a corporation, its creditors or assigns, had the right to question the validity of an incumbrance for its lack of the requisite assent of the stockholders, was neither presented nor considered. The question there was whether or not a trustee in bankruptcy could assail a chattel mortgage which was fraudulent as to creditors, and the court held that he could.

In *Duke v. Jarkham, supra,* and in *Mannhardt v. Ill. Staats Zeitung, supra,* the question here was neither raised, considered nor decided. In the Westerlund case the court considers the Carlsbad case as contrary to the conclusion there stated, but says of it:

"The result is that, laying aside the overruled California cases, but one opinion in *Carlsbad Water Co. v. New,* 33 Colo. 389, 81 Pac. 34, in which the question here at issue was presented, considered, and decided, has come to our attention in which it has been held that a corporation has the right to challenge its otherwise valid contract, on the ground that it was made without the required assent of its stockholders. That decision is for-

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tified by no argument or reason and by no authorities that have not been overruled."

It is inconceivable that the court in 33 Colo. intended to squarely overrule the doctrine of 9 Colo. without so much as offering a reason for so doing. The latter case is not cited in the briefs filed, and presumably not otherwise called to the attention of the court. It is even more to be doubted that with the question fairly presented, the court would have ignored entirely the vast array of decisions of our courts, both State and Federal, including the Supreme Court of the United States holding to the contrary.

By reason of the state of facts presented in the Carlsbad case, upon which the decision was rendered, and because of the overwhelming weight of authority against the conclusion there stated upon the question here considered, we cannot consider that case as controlling.

It is an unquestioned rule that a court of equity in the absence of fraud, will not set aside a contract that has been fully executed and closed on both sides, where each party has received and holds the proceeds and consideration for the contract, without first ordering a return to each party of the consideration, paid by it, and thereby placing the respective parties as near as may be *in statu quo*. The record shows that the plaintiff in error here has tendered an adjustment in accord with this principle.

Under this rule, the Dillon estate, being in possession of the real estate under the trust deed, and the Public Trustees' deed based thereon, must be held to have a prior equitable lien on the premises for the amount of the loan, even though the mortgage be regarded as void.—*Madison Ave. Bap. Ch. v. Olive St. Bap. Ch.*, 73 N. Y. 82.

To permit the judgment creditors to recover under such circumstances would in the language of the New York court, *Seymour v. Spring Forrest Assn.*, 144 N. Y.

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333, 39 N. E. 365, 26 L. R. A. 614, be to sanction a species of plunder which has no recognition or support in law or equity.

The judgment is reversed with instructions to enter judgment for the defendant below.

En banc.

WHITE, J., not participating.

Decided January 4, A. D. 1915. Rehearing denied February 1, A. D. 1915.

[No. 7095]

FAUSETT v. FOREMAN.

CONTRACT—*Validity—Nudum Pactum.* The agreement of a creditor whose demand is matured and payable, to accept the promissory notes of a stranger in satisfaction thereof, and this without any new consideration moving to him, is not enforcible.

Error to Larimer County Court.—Hon. FRED W. STOVER, Judge.

Mr. T. J. LEFTWICH, for plaintiff in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This action was instituted before a Justice of the Peace in Larimer County, and was appealed to the County Court. It appears that Foreman, the defendant in error, leased to the plaintiff in error, certain farm

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lands for a period of three years beginning December 31, 1906, and at the annual rental of $800.

At the end of the first year Faucett asked Foreman to release him from further obligation under the lease. To this Foreman agreed upon condition that Faucett would procure him another tenant for the remainder of the period for which the lease was to run, and upon the same terms, and who would be acceptable to Foreman. This was done and Foreman entered into such a contract with one Hostettler. At the time of this agreement Faucett was indebted to Foreman in the sum of $400, as a balance due on the first year's rent.

This action concerns an alleged agreement between Faucett and Foreman as to the acceptance by the latter of the promissory notes of Hostettler to the extent of $200, as part payment of the sum of money then due from Faucett to Foreman.

As to this agreement Foreman testified that he agreed to takes the notes of Hostettler to the extent of $200 in part payment of this sum, but that such notes were to be secured, and to be bankable notes. That afterwards he called at the bank where Faucett had left the notes, and upon examination discovered that the same were not secured, and were not bankable, as agreed, and for such reason declined to accept them.

On the other hand Faucett testified that the notes were to be simply the notes of Hostettler, to bear ten per cent interest, not to be secured, and that the notes left at the bank for Foreman were in full compliance with the agreement.

Both agree that the proposed notes of Hostettler had not at the time of the agreement been executed, and that the agreement involved the acceptance of notes thereafter to be executed by Hostettler.

It seems that prior to the institution of this suit

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Faucett had in other ways, and after the said agreement, paid Foreman $234.25, leaving a remainder of $165.75 due, if the notes are not to be considered. The suit was to recover this amount.

Upon the trial the court directed a verdict for the plaintiff for said sum. It is contended by the appellant that under his testimony, there was a complete novation of the contract, and that for such reason the disputed questions of fact should have been submitted to the jury.

We do not think the question of novation applies to the matter involved in any event. The debt upon which the plaintiff below claims, had accrued prior to the agreement for substitution of lessee, and was therefore not a part of such agreement.

Assuming for the purposes of the case that the promissory notes were to be executed as testified to by Faucett, he must still be held as the debtor of Foreman, and the latter could decline to receive or accept the notes as a satisfaction of the debt to that extent. This for the reason that there was no consideration going to Foreman for his agreement to accept such notes in payment upon the debt, which debt was an existing and matured one, for which Faucett was then obligated to make payment.

The law in such cases require that there must be mutual consideration, and an agreement to accept promissory notes in payment of a pre-existing debt, without some sufficient consideration therefor, is a non-enforcible contract. In this instance there was no benefit to accrue to Foreman and no detriment to Faucett.

The judgment is affirmed.

GABBERT, C. J., and GARRIGUES, J., concur.

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[No. 7433]

SNYDER v. COLORADO GOLD DREDGING COMPANY.

1. WATER RIGHTS—*Adjudication of Priorities.* In the statutory adjudication of priorities, the court is limited to an inquiry as to the volume of water to which the ditches are respectively entitled and their relative priorities. The title of a claimant to the conduit by which the water is diverted is not a matter for investigation or determination. (518)

2. ——*Conflicting Testimony.* Where the testimony as to the volume of water to which a claimant is entitled is conflicting, but there is sufficient to sustain the award made in the court below, it will not be disturbed. (518)

Appeal from Summit District Court.—Hon. CHARLES CAVENDER, Judge.

Mr. E. T. WELLS, for appellant.

Mr. WILLIAM V. HODGES, for appellee.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. This is an appeal by C. M. Snyder, from a final general adjudication decree rendered by the district court of Summit county in Water District No. 36, in a proceeding under the statute to settle the priority of water rights on Swan river, acquired by appropriation and use for beneficial purposes other than irrigation. The court entered a decree finding the Galena ditch, No. 6, according to the date of construction (The Colorado Gold Dredging Company, appellee, claimant) was entitled to priorities Nos. 5 and 30 for hydraulic placer purposes; that under priority No. 5 by construction, it was entitled to 15.63 cubic feet per second, to date from June 1, 1863,

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and under priority No. 30, by enlargement to 44.37 cubic feet per second, dating from September 1, 1898; that the Swan River ditch, No. 59 according to date of construction (E. T. Wells and C. M. Snyder the appellant, claimants) was entitled for placer mining purposes to priority No. 64 for 100 cubic feet per second, of date August 15, 1907.

2. In 1863 the Galena ditch was originally constructed in part, if not wholly, over the government domain, and across territory subsequently patented to E. T. Wells as the Mascot placer. In 1892 Wells made entry of the Mascot placer location, crossed then by the ditch, which was patented to him June 17, 1897. In September, 1898, the parties claiming to own the ditch and the right to use the water, enlarged it to carry what was decreed as priority No. 30 for 44.37 cubic feet. In doing so, they enlarged the ditch across the Mascot placer without the knowledge, consent or acquiescence of the owner of the premises, whom it appears has never been compensated for the extra right of way required or taken for the enlargement of the ditch across his placer location. In this adjudication proceeding it is claimed that because the enlargement across the placer was a trespass, no priority of appropriation was acquired thereby and that the court erred in decreeing to the ditch any appropriation on account of this enlargement. It is also urged that the claimant of the Galena ditch in the adjudication proceeding did not own the ditch or the water right, and that the appropriations awarded to it are excessive. The assignments of error are: 1st. That the Galena ditch ought to have been awarded an appropriation of only 4 second feet in respect of original construction and no amount in respect of enlargement, and ought to have been awarded no priority at all as against the Swan River ditch; 2nd. That the original Galena ditch

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and water right had been abandoned and the Colorado Gold Dredging Company acquired no right thereto by virtue of original construction; 3rd. That the alleged enlargement of the Galena ditch was an unlawful trespass upon the placer location and no appropriation could be initiated or acquired thereby.

3. The purpose of a statutory adjudication proceeding is to settle the volume or amount of water entitled to be diverted by, and the relative priorities of the ditches on the natural stream. The court in its inquiry is confined to this purpose and is without jurisdiction to hear or determine other matters. In the proceeding no evidence should have been received or considered relative to the enlargement being a trespass upon the placer location. The title to the canal, its right of way, or whether it owns its right of way, or how it may have acquired it, are matters that cannot be gone into or determined in a statutory adjudication proceeding.—*Haines v. Fearnley,* 56 Colo. 243, 138 Pac. 544, and cases there cited.

4. Claim is also made that the original Galena ditch and water right were abandoned, and that appellee should have been awarded no right by virtue of original construction; also that the amount awarded the ditch upon each priority is excessive. The testimony as to these matters was conflicting. We have gone carefully over the record and find sufficient evidence to amply sustain the decree.

Judgment affirmed.

Affirmed.

Decision *en banc.*

Decided February 1, A. D. 1915. Rehearing denied April 5, A. D. 1915.

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[No. 7720]

BOOTH, TRUSTEE, ET AL. v. CENTRAL SAVINGS BANK, TRUSTEE.

1. FIXTURES—*No Universal Test Of.* There is no universal test by which it can be absolutely determined whether a particular article is a fixture. A thing should be regarded as real or personal property, according to the intention of the owner, its relation to, and its connection in use with, the freehold, rather than from the manner in which connection with the freehold is accomplished. (520, 521)

It is not necessary that the thing should be actually attached to the land to make it a part thereof. (527, 528)

2. ——*Rolling Stock of a Railway*, and other like property, is generally regarded as a fixture, though in exceptional cases it may be treated as personalty. (521)

3. ——*Mortgage of Railway—Carriers Rolling Stock.* Where the law permits a railway company to mortgage its franchises and property as an entirety, a mortgage thereof in conformity with the statute governing mortgages of real estate, and duly recorded, creates a valid lien, though the statutes regulating chattel mortgages, and the creation of liens upon chattel property are disregarded. (527)

Sec. 110 of the General Laws subdiv. 7 (Rev. Stat. 5411,) construed in connection with the provisions of sec. 62, p. 138 of Rev. Stat. 1868 and sec. 5523, 5524, 5768, 5769, 5771 of Rev. Stat. 1908, grants to such corporations the power to mortgage the corporate property as an entirety. (530, 531)

Error to Denver District Court.—Hon. HUBERT L. SHATTUCK, Judge.

Mr. EDMUND J. CHURCHILL, Mr. GERALD HUGHES, Mr. BARNWELL S. STUART, Mr. E. E. WHITTED, Mr. ARTHUR PONSFORD, Mr. EVERETT OWEN, Mr. W. H. FERGUSON, Mr. WM. E. HUTTON, for plaintiffs in error.

Mr. HALSTED L. RITTER, Mr. S. E. MARSHALL, for defendant in error.

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Mr. JUSTICE WHITE delivered the opinion of the court:

The sole question to determine herein is, which of the contending parties has a superior lien upon "the rolling stock of The Argentine Central Railway Company," a Colorado railway corporation.

The defendant in error claims such lien by virtue of a mortgage deed in which it is named as trustee, given by The Argentine Central Railway Company upon its property as an entirety to secure its long term bonds, in the aggregate sum of $200,000 and recorded February 6, 1906. The plaintiffs in error, except the sheriff, who is interested in his official capacity only, are subsequent judgment creditors of the railway company, and claim liens by virtue of executions issued upon their respective judgments, and placed in the hands of the sheriff in June, 1911. Thereafter in a proceeding to foreclose the mortgage security for the payment of such bonds, the aforesaid judgment creditors of the railway company were made defendants and the question here involved arose.

It is claimed by defendant in error, in behalf of the bondholders, that the mortgage, which covered the real estate belonging to the railway company, as well as the rolling stock and other property of like character, was valid and binding upon both classes of property, though it was treated as a real estate mortgage only and the provisions of the Chattel Mortgage Act, Chap. 23, R. S. 1908, were not observed. Plaintiffs in error, on the other hand claim that the inclusion of the rolling stock and property of like character was of no effect, as the non-observance of the chattel mortgage act makes the lien, so attempted to be created thereon, void as against creditors of the mortgagor.

There is no universal test whereby the character of

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what is claimed to be a fixture can be absolutely determined, and the question whether the rolling stock of a railroad company is real estate or personal property when its status is not affected by statute, is not satisfactorily answered by the authorities. In a note to *Webster Lum. Co. v. Keystone L. & M. Co.*, 66 L. R. A. 1, 49, it is said that the Federal courts rather incline to regard it a fixture, while the trend of the decisions of the state courts is to regard it personal property.

We think the principle recognized and applied by the highest court of the land is, that where there is no statutory inhibition the class of property in question should generally be treated as a fixture, or permanent accession to the real estate, forming part of the road entity, though in exceptional cases it may be treated as personal property; and, further, where the laws permit a railroad company to mortgage its franchises and property as an entirety, and it does so execute a mortgage thereon, in conformity with the laws governing real estate mortgages, and the same is duly recorded, that thereby a valid lien is created, and the transaction is of necessity relieved from the operation of statutes concerning personal property, and the creation of liens thereon. Thus in *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111, the validity of a railroad mortgage which purported to cover the franchise, real estate and rolling stock of an Illinois railroad was involved. The contention was made that as the constitution of the state declared the rolling stock of railroad companies to be personal property, and subject to execution as such, and the mortgage in question not being executed and recorded as a chattel mortgage, it was invalid as to such property. The court, however, held that the constitutional provision in itself did not determine the fact that such rolling stock could only be mortgaged as personal property as that provision

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constituted only a partial modification of the *general rule* that the property of a railroad corporation used for necessary corporate purposes can not be seized and sold under an execution at law; and that where the laws of a state "permitted a railroad company to mortgage its franchises and property as an entirety" it might lawfully include such rolling stock and personal property as a part of the franchises and real estate of the corporation, and a mortgage so covering such property, executed in conformity with the law governing real estate mortgages only, created a valid lien thereon superior to the lien arising from a subsequent levy by execution upon such movable property.

It would seem upon a careful consideration of *Minnesota Co. v. St. Paul Co.*, 2 Wall 609, that the court had previously recognized the same principle. Such also has been the holding of other courts in language quite convincing. Thus in *Palmer v. Forbes et al.*, 23 Ill. 301, 312, it is said:

"Where the charter, or a general law of the State, authorizes a railroad company to mortgage either its real or personal estate, and provides no mode of execution or recording, and specifies no form for the instrument, and declares no effect which it shall have upon the rights of the parties or others, it would seem to follow, necessarily, that such mortgages must be subject to and governed by the general laws of the State, regulating mortgages; at least, so far as the general laws are applicable to the subject matter of the mortgage. As our laws applicable to mortgages of real and personal estate differ, the necessity of determining what is personal and what real estate is imposed upon us.

That the railroad itself, including the ground and superstructure, as well as the depot grounds, buildings and turntables, and the like, are real estate, no doubt has

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ever been expressed, but it is denied that the rolling stock and other property, capable of being removed from the road without breaking the soil or leaving a trace of the removal, is to be treated as a part of the road itself, and pertaining to the real estate.

We are of opinion that the rolling stock, rails, ties, chairs, spikes, and all other material brought upon the ground of the company incumbered by the mortgage, and designed to be attached to the realty, should be considered as a part of the realty, and incumbered by the mortgage as such; but fuel, oil, and the like, which are designed for consumption in the use, and which may be sold and carried away, and used as well for other purposes as in the operation of the road, and when taken away have no distinguishing marks to show, that they were designed for railroad uses, cannot, we think, with any propriety, be treated or considered as anything but personal property, and subject to, and governed by the law applicable to such property. Indeed, it is hardly to be supposed, that it was the understanding of the parties, that personal property, designed for immediate consumption, was ever intended to be embraced in the mortgage, except such as might be on hand at the time the mortgagees or trustees should foreclose or take possession under the mortgage. So long as the mortgagors should retain possession of and operate the road, all knew and intended that such property could never in any event be sold, or in any way appropriated to the satisfaction of the debt, by the trustee. All knew, that the process of consumption and fresh supplies of such property must be ever going on, and that it could never be touched by the trustees, except what might happen to be on hand at the moment possession should be taken. To say that a mortgage, which upon its face provides for its maturity twenty years hence, was designed to embrace and hold

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the fuel and oil which all knew and intended should be consumed to-morrow, if not absurd, is a refinement beyond that practical common sense which we are capable of comprehending. As a practical truth, we cannot for a moment believe that such was the honest purpose or intention of either party. Indeed, such an intention could have been entertained by either party, only for the purpose of protecting the property from the creditors of the company for its benefit, that it might consume and use it, and not that it might be appropriated by the law or by the trustees in the payment of the bonds. But property,—designed for permanent use, and which was expected would continue permanently in the use of the road, or if worn out gradually, would be as gradually replaced, so that practically the same thing continued,—it was the undoubted design of both parties, should be embraced in the mortgage, and ultimately appropriated to the payment of the debt.

We are not departing from the common law rule, when we hold that the rolling stock and material provided for the repair of the track, are a part of the real estate. It is not necessary in all cases that things should be actually affixed to the freehold, in order to constitute a part of it for the purpose of transfer and sale. Take the case of mill stones, which are constantly being taken up and sharpened; when up, they are as much a part of the mill as when in their beds, and would pass by a deed or mortgage of the mill, if they had been, in fact, detached for six months. So of various kinds of machinery, as a screw or cutting engine, or lathe, where a great multitude of different sized pinions or cutters are kept on hand, but only one of which can be used at a time. All of these are necessary to make the complete machine, and would pass by a sale of the factory as being a part of it, but with no more propriety than is the rolling

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stock a part of the railroad. No road can be complete without its machinery, any more than would a cotton or a grist mill. Would not the sale of a foundry, as such, convey the flasks and moulds within it? Yet who would contend that the coal on hand would pass by such a description, or that a mortgage of a foundry and the stock on hand, would protect the coal which the mortgagor was actually putting into the furnace, from an execution against him, or prevent him from selling it to his neighbor, and converting a good title? Money is property, and by the terms of the mortgage, was embraced within it, but we cannot presume that it was the intention of the parties that the money on hand, and which both parties expected and intended should be immediately paid out and expended in the operation of the road by the mortgagor, was subject to the lien of the mortgage, and that no person knowing of the existence of the mortgage, could receive it of the company, without making himself liable to the mortgagees. We venture to say that no one expected or intended that any such right was secured to the mortgagee by the mortgage. Nor do we want analogies in the well settled principles of the common law, to hold that materials provided and designed to be attached to the road, are, for the purposes of a mortgage or a conveyance, a part of the real estate itself. It is a familiar principle to all, that rails hauled on to the land, designed to be laid into a fence, or timber for a building, although not yet raised, but lying around loose, and in no way attached to the soil, are treated as a part of the realty and pass with the land, as appurtenances. By applying these familiar principles of the common law, we may be enabled to determine what we should consider as appurtenant to the freehold, and what should pass by a conveyance of the road, and consequently what is covered by and embraced within a mortgage encumbering the road,

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acknowledged and recorded as a mortgage of real estate."—*Cooper et al. v. Corbin et al.*, 105 Ill. 224, 233, is to the same effect. We quote therefrom as follows:

"But it is said the deeds of trust did not create a valid lien on the personal property, as they were not acknowledged as required by the act in regard to chattel mortgages. We do not think the act in regard to chattel mortgages has any bearing whatever on mortgages or deeds of trust of the character of those under consideration. * * * The railroad company in this case had express authority under its charter, to mortgage all of its property, both real and personal, as an entirety. The fact that the mortgage embraced the franchise, the real and personal property, did not impair its validity. It was enough that the legislature had conferred the power on the company, and that the power had been executed in the manner acquired by the charter. When the mortgage was executed, acknowledged, and placed upon record, it became a lien upon all of the property of every description it contained. * * *."

In *Bishop v. McKillican*, 124 Calif. 321, 329, 57 Pac. 76; 71 Am. St. 68, the court, in declining to follow the decision in *Southern Cal. etc. Co. v. Union Loan & Trust Co.*, 64 Fed. 450, 12 C. C. A. 215, endeavored to make a distinction as to the effect of a mortgage deed covering the class of property here under consideration, executed under a statute which in express terms authorized the corporation to mortgage its franchises and real and personal property "as an entirety," and those executed under statutes conferring like power but without the words "as an entirety." We think no such distinction exists. On the contrary, *Hammock v. Loan & Trust Co., supra,* clearly shows that if there is no inhibition against mortgaging the property as an entirety, and the power to mortgage all its property is conferred upon a railroad

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corporation, it is invested with the former power. And in *Cooper v. Corbin, supra*, the statute is set forth and contains, in the granting of the power to mortgage the property of the railroad company for the purposes aforesaid, only general terms. Nevertheless, it is therein said that "the railroad company in this case had express authority, under its charter, to mortgage all of its property, both real and personal, as an entirety." Moreover, the decision in *Bishop v. McKillican, supra*, is not based upon the alleged distinction in the statutes but is really based upon the peculiar language of the chattel mortgage act of that state, the first section of which specifies what articles of personal property may be mortgaged thereunder, which includes "locomotives, engines and other rolling stock of railroads." While another subdivision of the same section includes "growing crops;" and it having been held that the chattel mortgage act was "an exclusive mode for mortgaging growing crops," it was likewise exclusive as to the other property designated therein. So, under and within the terms of the chattel mortgage statute of the State of Washington, rolling stock of a railroad company is personal property for the purposes of such statute, and the cases arising in that state are not in point.

However, without regard to these decisions, we are satisfied that upon principle the doctrine declared by the Supreme Court of the United States as hereinbefore stated is correct. This conclusion seems inevitable when we consider the character and nature of fixtures and the purpose and object of railroads and the nature of the property in question. It is firmly established law that a thing should be regarded as real or personal property according to its relation to, and connection in use with, the freehold, together with the intention of its owner, rather than from the manner in which that connection may be ac-

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complished, and actual fastening to the freehold is not necessary to make a thing a part of such estate. Thus in *Hardware Co. v. McCarthy,* 10 Colo. App. 200, 219, 221, 50 Pac. 744, "matte pots," used on a track at a smelter for carrying matte from forehearths, and ore cars used for hauling slag, were classed as fixtures incident to the real estate. As to the matte pots, it is said: "They were very heavy, weighing several tons each and were attached to the furnaces, but could be detached and moved, being on wheels, and there being a track for them to run on." And in speaking of the matte pots and ore cars, it is said: "Each of these articles was necessary and essential to the successful operation of the smelting plant for the purposes for which it was intended. Each was a component part of the whole. The forehearth was necessary for receiving and separating the matte and slag, the matte pot for removing them and the cars for hauling the slag." And, again, in the same opinion, after stating the former rule controlling the question in deciding on which side of the line of division between personal and real property an article belonged, and that the rigid rule formerly prevailing had been modified, the court said: "Now it is not absolutely necessary that in order to constitute a fixture, so as to take an article from without the line of personal property, it should be permanently affixed to the freehold by the physical attachment. This may or may not be the case. * * * If it constitutes a part of a plant of machinery necessary to the successful operation of the whole, or if its use is essential to the operation of some part of the machinery, which is physically attached to the freehold, then it may in many cases be properly termed a fixture, even though it wholly lacks a permanent physical attachment to the realty."

The same principle is recognized in *Roseville A. M.*

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Co. v. Iowa G. M. Co., 15 Colo. 29, 31, 24 Pac. 920, 22 Am. St. 373, in which is cited the Illinois case, *Palmer v. Forbes, supra,* which, as we have seen, holds that "rolling stock," etc., of a railroad should generally be considered as a part of the realty. Now, a railroad company is created by law to build, equip and operate a railroad. This is its sole purpose and the rolling stock is as essential thereto as the roadbed, ties and rails. Under these circumstances, coupled with the fact that the railroad company included such property in its real estate mortgage, it is reasonable to presume that the company in the instant case intended the rolling stock to be used only for the road, that is, to become a permanent accession to, or fixture of, its real estate.

In *Roberts v. Johnson,* 5 Colo. App. 406, 39 Pac. 596, it is expressly declared that rolling stock of a railroad company is an integral part of the road and absolutely essential to its successful operation and maintenance as a railroad, and does not come within the provisions of chattel mortgage acts as to the necessity of observing the provisions of such statutes in the recording of railroad transfers and securities. While the character of such property was not involved therein and the language is, therefore, *obiter,* the declaration is quite persuasive, and as applied to the facts of this case is correct.

However, should it be conceded, as contended, that in the absence of statutory declaration or intent the property of a railroad company of the nature of rolling stock, is, by the weight of authority, personal property, the statutes of this state, we think when fairly considered, class it generally as real estate. The power to mortgage its property given a railroad company by the laws of this state has always been, by virtue of a special grant as distinguished from the power invested in corporations generally. It appears that in 1867, § 62, p. 138

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R. S. 1868, railroad companies were given the specific power to mortgage their property, and their rolling stock declared for such purpose to be realty. That act expressly enumerated the property which might be so mortgaged, that is, the road of the company, its depots, depot-grounds, rolling stock and such other property or lands of which it may be lawfully possessed. Thereafter the phraseology of the section was changed and in the General Laws of Colorado, § 110, p. 181, 7th sub.; § 5411, R. S. 1908, the specific properties of a railroad company which may be mortgaged are not enumerated but the power is therein given "to mortgage its corporate property and franchise to secure the payment of any debt contracted by such corporation for the purposes" enumerated, "and in such manner as the shareholders representing a majority of the stock of such corporation may direct." We think the power is here clearly granted to mortgage the corporate property as an entirety. All the power which the stockholders had under the former act is contained in the latter, which was the act in force when the mortgage in question was executed. The former act contained a specific declaration that rolling stock should be considered realty in a railroad mortgage. In the latter act the power to mortgage the corporate property is specifically given coupled with the further declaration that it may be done in such manner as the shareholders representing a majority of the stock may direct. In other words, the power to mortgage its corporate property is essentially the power to mortgage all its property as an entirety unless by some statute a valid mortgage can not be executed thereon covering such entire property. Now, as we have seen, the legislative judgment in the prior act, was that rolling stock should be considered real estate, and in the latter act, by granting the power to mortgage its corporate property in such

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manner as the stockholders might determine, clearly invests the power to include in such mortgage the rolling stock as realty.

Moreover, § 5523 R. S. 1908, provides for contracts whereby the vendor of railroad equipment may preserve title in himself until payment for such equipment is made and thus prevent the same from being covered by superior mortgage liens. § 5524 regulates leasing of such equipment, also provides for conditional sale thereof and prevents title thereto from passing to lessee or vendee until the purchase money shall have been paid in full. § 5525 provides for execution of contracts in reference to matters covered in the two preceding sections. It requires, *inter alia,* that such contracts be acknowledged by the vendee or lessees before some officer authorized by law to take acknowledgments of deeds, and to be recorded in the office of the secretary of state, and in the office of the recorder of each of the counties in which the railroad may be operated in this state, while § 5527 requires that such contracts "may be acknowledged in the form required as to conveyances of real estate." Are not these provisions significant, and pregnant with meaning as to the legislative understanding of the proper classification of such property? They carefully provide a means whereby the vendee may not become invested with the title to the property until the vendor has received payment therefor. This is essential, it would seem, for without such provisions the combining of ownership of such peculiar class of property, of particular use, in the person owning the real estate upon which such property is used and designed to constitute a complete entity or plant, would ordinarily render each and every part of the plant inseparable from the other and class the entire thing as real estate. This legislative understanding is further evidenced by the requirement that the acknowledgments

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of such contracts be before some officer authorized by law to take acknowledgments of deeds in the form required as to conveyances of real estate.

Furthermore, the revenue laws of the state treat such property of a railroad as a part of the integral unit, except under peculiar circumstances. Thus § 5768 provides that if taxes shall become delinquent upon the property of any railway, telegraph or telephone company, express company, fast freight company, palace car or sleeping car company, etc., the county treasurer of the county in which such taxes shall be delinquent shall distrain, and may sell any of the personal property of such corporation wherever found in the manner as other personal property is to be distrained and sold for the nonpayment of taxes. Here is authority to sell all personal property of such corporations, but the sections immediately following exclude rolling stock of railroad companies as personal property except under certain conditions. Thus § 5769 limits the rolling stock of railway corporations, that may be distrained and sold as personal property, to that which is "*found elsewhere than upon the railways of such corporation respectively,*" and further provides, that if by such distrainment and sale of the personal property the whole tax is not realized, the railway shall be sold *en masse* as one property. While § 5770 declares that the rolling stock of every railroad corporation, not previously distrained and sold pursuant to the provisions hereof, wherever such stock may be and whether within or without the state, shall be deemed and taken to be parcel of the railway and shall pass with the railway to the purchaser thereof at any such sale. That such is the correct view, as to the policy of the state with reference to rolling stock of a railroad, is not weakened by § 5771. On the contrary, the correctness of such view is rather confirmed thereby. The section provides,

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substantially, that express companies, sleeping car companies, fast freight companies, etc., shall be deemed personal property. It is a matter of common knowledge that such companies own only the cars, and operate them by agreement over the tracks of railroad companies. Under such facts the only property they own is personalty. There is no union of ownership of real estate and personal property of character and peculiar use therewith, essential to make of the personalty, a fixture of the real estate.

The decision of the trial court denied the claims of the judgment creditors and sustained the validity of the mortgage lien, and is, therefore, affirmed.

Judgment affirmed.

Decision *en banc.*

[No. 7884]

SCURVIN DITCH COMPANY v. ROBERTS ET AL.

EMINENT DOMAIN—*Value of Land Taken*, is to be estimated, not merely with reference to the use to which it is at the time applied, but with reference to all uses to which it is plainly adapted. The owner is entitled to the market value thereof, considered with reference to all useful purposes, to which in its then condition, it can be devoted. (534)

Error to the Court of Appeals.

Messrs. LEE & AYLESWORTH, for plaintiff in error.

Mr. FRED FARRAR, for defendants in error.

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Mr. JUSTICE BAILEY delivered the opinion of the court:

The cause is here upon writ of error to review a judgment of the Court of Appeals, opinion reported in 22 Colo. App., at page 120, 125 Pac. 552, reversing a judgment of the District Court of Larimer County, wherein the trial court held, in effect, that a certain excavation on land belonging to the Roberts Brothers could not be taken into consideration in determining the worth or value thereof, to the Scurvin Ditch Company, who sought to condemn the land for a ditch right of way, the intention being to make use of the excavation referred to as a part of the ditch which it proposed to construct.

The Court of Appeals, in reversing the trial court, correctly announced the doctrine, in substance, that the value of land taken under the statute of eminent domain is to be estimated, not merely with reference to the use to which it is at the time applied, but with reference to all uses to which it is plainly adapted, and that the owner having thereon an excavation for an irrigating ditch, is entitled to the market value of the land, considered with reference to all useful purposes for which it, in its then condition, is available.

Upon thorough examination of the record, the respective briefs of counsel and the opinion of the Court of Appeals, we are persuaded that the conclusions reached by that court are correct and that the judgment based thereon should be affirmed.

In this connection, however, in case of retrial of the question of damage for the taking of the land, it is to be noted that neither the actual amount expended in constructing the ditch, nor the reasonable cost of reproducing it, are elements in fixing the same, but the true measure is the worth of the land for valuable uses,

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because of its availability, existing conditions considered.

The judgment of the Court of Appeals is affirmed, and the cause is remanded to it for further action.

Decision *en banc.*

Mr. JUSTICE WHITE dissents.

Mr. JUSTICE GARRIGUES not participating.

Mr. JUSTICE WHITE dissenting:

The decision of the Court of Appeals sought to be reversed herein is found in 22 Colo. App. 120, 125 Pac. 552. The action is a condemnation suit wherein The Scurvin Ditch Company acquired land of the appellants for a right-of-way for an irrigating ditch. There was no answer made to the petition in condemnation, which constituted the sole pleading. Commissioners were appointed and reported, but the evidence they received, and upon which they acted, is not embodied in the record. In fact, the matters presented to this court, and to the Court of Appeals, are based solely upon the petition in condemnation, the report and award of the commissioners, and the verified motion of appellants to set the same aside. The petition in condemnation shows that Roberts Brothers instituted an injunction suit against The Scurvin Ditch Company to prevent it from occupying the land upon which it was engaged in constructing its ditch, along the line of which there had previously been constructed, or partially constructed, by the North Poudre Irrigation Company, an excavation intended for a ditch which had been conveyed to The Scurvin Ditch Company. It further shows that a rule was thereupon entered directing the issuance of an injunction, unless

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The Scurvin Ditch Company should forthwith institute condemnation proceedings to acquire the lands needed. The petition in condemnation conceded some right or ownership of Roberts Brothers in and to the proposed right-of-way which The Scurvin Ditch Company desired, upon which the previously constructed excavation or ditch existed, and asked to have the matter determined and the damages for taking the same assessed. The award of the commissioners shows that the value of the ditch excavation at the time existing upon the land, was not considered but the value of the *land* taken and damaged, together with the benefits to the residue, was determined.

The motion of Roberts Brothers, to set aside the award of the commissioners, was based upon the alleged findings and decree in the injunction suit. In the decision rendered by the Court of Appeals the alleged findings and decree are set forth in full. From an inspection thereof it is seen that after reciting that The Scurvin Ditch Company had filed its petition in eminent domain to acquire the right-of-way for its ditch over the land of Roberts Brothers, in the manner provided by law, and that nothing further remained to be done in the injunction suit, such action was by the court dismissed. Notwithstanding the dismissal of that action it is declared in the opinion of the Court of Appeals that the decree rendered therein became "final" and constituted a "judicial determination" between the parties of the matters set forth in the decree. Court of Appeals Opinion, *supra,* pp. 124, 127, 133.

Until such declaration by the Court of Appeals and the affirmance thereof by the majority opinion herein, I presumed there was no exception to the rule that a dismissal of a suit nullified all proceedings therein, and that after such act the rights of the parties were unaffected thereby. I am still unable to understand, on principle,

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how the findings of fact and a decree of the court thereon, in the injunction suit, which action the court thereafter dismissed, can subsequently be of avail in favor of or against either party. On the contrary, I think the injunction proceedings, the findings therein, and the decree, were devoid of life and effect as soon as the condemnation suit was instituted, but, if not then, clearly so upon the dismissal of the action in which the findings were made and the decree entered. The injunction proceedings had thereupon served its purpose and was binding on no one. Moreover, the only question which could be litigated in the injunction suit was the ownership of the land, and the right of The Scurvin Ditch Company to enter thereon, and the filing of the condemnation proceedings conceded such ownership and right of possession to be in Roberts Brothers. It did not, however, concede the ownership of the ditch structure existing or placed thereon. The fact that The Scurvin Ditch Company, in the injunction suit, sought to establish its right to the possession of the land, under the law of estoppel or prescription, and failed so to do, or that the court therein and upon the evidence there produced, found that there had been a cessation of work or non-use of the ditch for a long period of years, and thus an abandonment, and thereafter dismissed the case, was in no sense determinative of the question as to whether Roberts Brothers were entitled, in a condemnation proceeding, to compensation for a ditch on such land in the construction of which they never expended a dollar, and which was built by the grantor of The Scurvin Ditch Company at its own expense. In other words, there was no existing judicial determination that the work in constructing the ditch, by The Scurvin Ditch Company or its grantor, constituted a part of the real estate upon which it was placed; and as both The Scurvin Ditch Company and

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its grantor were, under the constitution of this state, vested with the power of eminent domain for their needs in the construction of such work, it did not necessarily become a part of the realty by operation of law. The great weight of authority, as stated in 15 Cyc. 763, 764, is, that when a person or corporation, "invested with the power of eminent domain enters upon land without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common-law rule that a structure erected by a tort feasor becomes a part of the land does not apply, and the owner is not entitled to the value of the improvements thus wrongfully erected. So where a company enters and erects improvements pending condemnation proceedings which are subsequently abandoned, or where it has no positive knowledge as to the ownership of the land, and enters upon it with the intention of subsequently instituting condemnation proceedings, or of subsequently purchasing the land, the owner is not entitled, in proceedings for condemnation afterward commenced, to an award for the value of the improvements so constructed."

Moreover, the rule as I understand it, is not confined, as the opinion of the Court of Appeals would seem to imply, to a particular class of property, such as pipe lines, railroad tracks, etc. On the contrary, it applies to any improvement, though it may consist only in the displacement of the soil in the making of an irrigating ditch, provided only that such improvement was constructed or placed thereon by one invested with the power of eminent domain and who, or whose assignee, seeks thereby to take the land upon which the improvement is located.—*McClarren v. Jeff. Sch. Twp.*, 169 Ind. 140, 82 N. E. 73, 13 L. R. A. (N. S.) 417, 13 Ann. Cas. 978; *Chase v. Jemmett,* 8 Utah, 231, 30 Pac. 757, 16 L. R. A. 805; *Aldridge v. Board of Ed.,* 15 Okla. 354, 82 Pac.

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827; *San Francisco, etc., R. Co., v. Taylor,* 86 Cal. 246, 24 Pac. 1027.

The facts of the case at bar clearly bring it within this rule, if the rights of the parties be determined from the records before us. The original ditch construction upon the land was made by a person or corporation authorized to acquire the land for that purpose by condemnation, and at a time when it was thought the land was a part of the public domain and whosoever desired had an absolute right to enter thereon and use the land for such purpose. The Scurvin Ditch Company, the assignee of the original constructor, was and is likewise authorized to acquire land by condemnation for ditch purposes. While the award of the commissioners shows that they did not consider the value of the ditch excavation existing upon the land, the court, nevertheless, approved the award, and in the absence of evidence to the contrary it should, in my opinion, be conclusively presumed that the evidence taken and proceedings in condemnation convinced the court that such improvement was, in no sense, a part of the real estate but a distinct entity belonging to The Scurvin Ditch Company. In any event, the award of the commissioners should not be set aside, unless it was first determined, by a proper adjudication, that the ditch structure or excavation had become a part of the real estate.

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[No. 8041]

SCOTT v. STUTHEIT.

1. PLEADING—*Formal Defects.* Where in the court below no attempt is made to compel the amendment of a pleading, the case will, in the court of review, be determined upon the issues which, upon a fair construction, the pleading tenders. (542)

2. BILL OF EXCEPTIONS—*Amended.* The bill of exceptions as amended and settled by the trial judge is conclusive that the evidence there set down was introduced and considered, though not set out in the original bill. (543)

3. HOMESTEAD EXEMPTION—*Federal Statute.* The sale of lands entered as a homestead, under execution against the patentee, upon a judgment recovered for a debt contracted prior to the issuance of the patent, is void. (543)

4. APPEAL AND ERROR—*Judgment.* It being apparent that the plaintiff in error was without right, a judgment against him was affirmed. though the record was imperfect and incomplete. (543)

Error to Yuma District Court.—Hon. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for plaintiff in error.

Mr. EDWARD AFFOLTER, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

On February 4, 1904, defendant in error, Stutheit, plaintiff below, filed complaint in the usual form against plaintiff in error, Scott, defendant below, in the District Court of Yuma County, to quiet title to a certain quarter-section of land. The answer denied all the allegations of the complaint, except that of adverse estate or interest. The cross-complaint filed in the case shows, in substance, that plaintiff owned the land on April 11, 1901, when an

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action was brought against him by defendant, in the District Court of Arapahoe County, resulting in a judgment upon which, after execution, levy and sale, a sheriff's deed to the land in controversy issued to defendant, which deed is set out and relied upon for a decree quieting title in him. The replication, in substance, admitted the issuance and record of the purported sheriff's deed, denied on information and belief all other matters of the cross-complaint, and further set forth a homestead entry of the land by plaintiff on May 23, 1894, the issuance of final certificate February 23, 1900, and United States patent October 12, 1900; that judgment, the basis of the sheriff's deed, was obtained against him by defendant in Arapahoe County on a promissory note executed May 21, 1894; that the sheriff's deed was unwarranted in law and void, but constituted a cloud upon his title to the land; also that there was no service of the attachment writ issued in the case in aid of the suit.

The cause is on review a second time, but the pleadings, relative positions of the parties and judgment are unchanged. It was remanded for a new trial because judgment was rendered out of term time, and at chambers in another county,—*Scott v. Stutheit,* 21 Colo. App. 28, 121 Pac. 151, with directions, upon the authority of *Wilson v. Collins,* 45 Colo. 112, 102 Pac. 21, permitting the introduction at the new trial of evidence theretofore adduced. At the former trial plaintiff introduced a homestead patent, and defendant a sheriff's deed, whereupon plaintiff, in rebuttal, attacked the validity of the deed for failure of service of the writ of attachment issued in the case, and because execution was levied upon and sale made of a homestead, upon a judgment which had been obtained on a debt contracted before patent issued for such homestead.

At the trial, resulting in the judgment under con-

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sideration, the evidence formerly adduced on behalf of plaintiff, as preserved by the bill of exceptions, was re-offered and admitted subject to objections for immateriality. Counsel for defendant conceived that the replication, containing denials upon information and belief as to the sheriff's deed the same being of record, constituted an admission of its validity, and interposed objection to the introduction by plaintiff of any evidence, which was overruled, as was also a motion for judgment for defendant upon the proofs, whereupon defendant rested, declining to offer evidence. The abstract of record fails to show the rebuttal evidence adduced on behalf of plaintiff at the former trial, but the supplemental abstract shows that upon motion the record was amended to show the fact that such rebuttal evidence was introduced and considered, setting out the same as it appears in the record signed and sealed by the trial judge. The cause was tried to the court without a jury, judgment rendered for plaintiff and a decree entered quieting title to the premises in him, which defendant brings here for review.

The main contention of the defendant is that denials in the replication upon information and belief constituted no denial of the sheriff's deed. Be that as it may, it contained other averments sufficient to put the validity of the deed in issue, and if true to avoid it. While the issuance and record of the deed were admitted, its validity has been at all times consistently and earnestly questioned and denied. The replication is most inartificially drawn and is in no sense to be approved, still as no attempt was made to compel the pleader to amend, we think the case must be determined upon the issue which may fairly be said to be tendered by it.

Another contention made is that the rebuttal testimony adduced at the first trial was not in fact reoffered, and not therefore properly for consideration, in this

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trial, is not supported by the record. The bill of exceptions, as amended and settled by the trial judge, shows that such testimony was in fact introduced and considered, and this must govern.

The pleadings and testimony plainly establish that the debt for which the defendant took judgment, upon which the sheriff's deed was obtained, was contracted prior not only to the issuance of homestead patent to the land in controversy, but before the original homestead application even was made. The deed was, therefore, invalid and conveyed no title, under Section 2296, Rev. Stats. U. S., which reads as follows:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent."

The following authorities fully support the foregoing proposition and are decisive of the case.—*Smith v. Schmitz*, 10 Neb. 600, 7 N. W. 329; *Baldwin v. Boyd*, 18 Neb. 444, 25 N. W. 580; *Brandhoefer v. Bain*, 45 Neb. 781, 64 N. W. 213; *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932; *Clark v. Bayley*, 5 Or. 343; *Faull v. Cooke*, 19 Or. 455, 26 Pac. 662, 20 Am. Rep. 836; *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825; and *Dickerson v. Cuthburth*, 56 Mo. App. 647.

From a survey of the entire record, unsatisfactory, incomplete and imperfect as it is, it is manifest that the defendant has, and can have, no valid claim to this property, that plaintiff must ultimately prevail, and it would, therefore, be not only idle but a positive injustice to all parties in interest to permit further litigation.

The judgment is affirmed.

Chief JUSTICE GABBERT and Mr. JUSTICE WHITE concur.

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[No. 8052]

GIBSON v. WOODS.

1. QUIT-CLAIM DEED—*Effect of Acceptance.* One claiming under a void tax deed but not in possession of the land, does not, by accepting the quit-claim deed of the original proprietor, become liable under the covenants of such proprietor, nor part with his right to the redemption money prescribed by statute. (548, 549)

2. VOID TAX TITLE—*Right to Redemption Money.* Where one while under no obligation or duty to the mortgagee to pay the taxes acquires a tax title, the mere taking afterwards of a quit-claim deed to the land from the mortgagor does not destroy or defeat the tax title, or, should it be declared void, the right to the redemption money. (549)

Syllabus by GARRIGUES, J.

Error to Conejos District Court.—Hon. CHARLES C. HOLBROOK, Judge.

This suit to quiet title, concerns a tract of land in Conejos county, for which a patent was issued in 1888 to one Flemming, and from whom it passed by mesne conveyances to Harriet E. Chapman. In 1889 she executed a trust deed on the property containing the following clause:

"And that she will not at any time hereafter, until the said principal sum and the interest thereon shall have been fully paid suffer said premises, or any part thereof, to be sold for any tax or assessment whatsoever, nor will she do, or permit to be done to, in, upon or about said premises, anything that may in anywise tend to impair the value thereof, or to diminish the security intended to be effected by virtue of said instrument."

In 1899 the land was sold to the county for the taxes of 1897, and November 16, 1901, the tax sale certificate was purchased by and assigned to Jesse Ruby, who paid

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the taxes for 1898, 1899 and 1900, endorsed thereon, February 17, 1902, Ruby took a treasurer's deed on the certificate and August 7, 1903, conveyed to William S. Woods, defendant in error, whatever right he had acquired. June 17, 1897, the land was sold to the county for the taxes of 1895 and in 1901 the tax sale certificate was assigned to Ruby who in 1907 assigned it to Woods, and November 25, 1907, Woods took a treasurer's deed on the certificate.

In 1898 the land was sold for the taxes of 1896 and in 1901 this tax sale certificate was assigned to Ruby, who in 1907 assigned it to Woods, and November 25, 1907, Woods took a tax deed on this certificate.

In 1903 the land was sold to the county for the taxes of 1901 and June 25, 1903, this tax sale certificate was assigned to Ruby who March 24, 1904, assigned it to Woods, and in 1907 Woods took a tax deed on this certificate.

July 22, 1904, Woods took a quit claim deed to the land from Harriet E. Chapman.

In 1908 the trust deed given by Chapman was foreclosed, and November 28, 1908 a trustee's deed given to Charles E. Gibson, plaintiff in error.

In 1911, Gibson brought this action under the code to quiet title, alleging he was in possession of the land; that Woods claimed some adverse right therein, and asked that he be required to set forth the nature and character of the right. Woods' answer admitted that he claimed to own the land in fee simple, and set forth the nature and character of his right as being grounded upon the tax title he had taken in 1902 from Ruby; that in 1899 the land was sold for the taxes of 1897, and in 1902, a tax deed was issued to Ruby who also paid three years taxes endorsed upon the certificate, and in August, 1903, Ruby conveyed whatever right he had, to Woods,

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who had since paid the taxes; also that he held tax deeds on the land for the taxes of 1895, 1896 and 1901.

On the trial plaintiff introduced in evidence the U. S. patent to Flemming, the Mesne conveyances to Chapman, the deed of trust given by Chapman in 1889 and the trustee's deed to Gibson in 1908, and rested. Defendant then offered the 1902 tax deed to Ruby and the other tax deed, and it was stipulated that whatever right Ruby acquired became vested in Woods by a deed, on August 7, 1903. On objection being interposed to their introduction, the court excluded all the tax deeds, for the reason that they were void upon their face. Woods then claimed to own the right to redemption and reimbursement, and the parties stipulated in open court that upon the question of the ownership of the right to redemption, and to the redemption value of the tax sale certificates, and other taxes, that Woods and his grantor Ruby had paid the taxes by tax sales, tax deeds and other payments for the years '95, '96, '97, '98, '99, '00, '01, '02, '03, '04, '05, '06, '09 and '10, and if the court should find Woods owned the right to redemption, and was entitled to be reimbursed, that the attorneys would procure from the county treasurer a compilation of the amount of such payments, interest and penalties, which should be inserted in the decree as a finding of fact in open court upon proof. Defendant then rested, and plaintiff, to defeat Woods' claim to the ownership to the right to redemption, offered in rebuttal a quit claim deed of date July 22, 1904, heretofore mentioned, from Harriet E. Chapman to William E. Woods.

February 1, 1913, the court in its final decree, pronounced the tax deeds void, and found that Gibson was the owner and in possession of the land; that Woods had no title, but did own the right to redemption, which was of the value of $939.58, and which Gibson was adjudged

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to pay into court to reimburse Woods. Gibson brings the case here for review.

Mr. JOHN F. MAIL, for plaintiff in error.

Mr. JESSE STEPHENSON, for defendant in error.

GARRIGUES, J. (after stating the facts as above.)

1. At the tax sale of 1899, the county bid in the land for the taxes of 1897; Ruby bought the tax certificate in 1901, paid the taxes of 1898, 1899 and 1900 endorsed thereon, took a tax deed in February, 1902, and August 7, 1903, conveyed the land to Woods.

The property was sold to the county in 1897, 1898 and 1903 for the taxes of 1895, 1896 and 1901, and these certificates were bought by Ruby and assigned to Woods who took tax deeds thereon. July 22, 1904, Chapman quit-claimed to Woods. The Chapman trust deed of 1889 was foreclosed in 1908, and Gibson took a trustee's deed.

There is no dispute regarding the invalidity of the tax deeds or the amount required to redeem, in case Woods still retains the right to redemption. The only question is over Woods' right to reimbursement. He claims he still owns the right to redemption and should be reimbursed. Plaintiff in error takes issue with this position, and contends that Woods became the successor in title to Chapman, whose duty it was as mortgagor to pay these taxes, and that on account of taking the quit-claim deed, he is entitled to no reimbursement whatever; that the duty of Chapman to keep the title clear of taxes, descended and became imposed upon Woods as her successor; that by reason of taking this deed, it became Woods' duty, as it was Chapman's, to clear the title from tax liens, and that he can own no right to redemption from tax sales, the lien of which the law im-

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posed upon him the duty of discharging; that although he had in 1903 acquired the right from Ruby, he lost it when he took the quit-claim deed, the mere taking of which was in effect a legal redemption from the tax sales.

With this contention we cannot agree. The taxes of 1897 were a prior lien to the trust deed of 1889. The county bid in the land for these taxes at the tax sale of 1899 and by purchasing the tax sale certificate from the county in 1901 and paying the taxes endorsed thereon, Ruby acquired from the county the right to redemption which was a prior right or lien to the trust deed, and in 1902 took a treasurer's tax deed. If valid, Ruby derived a new title free from the lien of the trust deed, and paramount to any title based thereon; if void, while he acquired no title, he still retained and owned the vested right to redemption and reimbursement. Woods in 1903 became the owner of a vested right theretofore acquired from the county by Ruby. If the tax sale was valid, he had a perfect title, acquired by operation of law, free from all liens; if it was void, he still owned and held the right to redemption and reimbursement. The court pronounced the tax deeds void and held that Woods still owned the right to redemption and should be reimbursed. Gibson now contends that the mere taking of a quit-claim deed in 1904 from Chapman the mortgagor, whose duty it was to pay the taxes, divested Woods of this prior right to redemption acquired from Ruby in 1903 and had the effect of transforming Woods' right of redemption into a payment of taxes or a redemption from the tax sales, thus clearing the title from the tax liens; that neither the mortgagor, nor any one whose duty it was to pay the taxes, could defeat the mortgage by permitting the taxes to be delinquent and acquiring the tax title; that no right can be acquired by neglecting such duty to the mortgagee; that the purchase of land at a tax sale by a mortgagor or his successor, whose duty it is

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to pay the taxes, is regarded in the light of a payment of the taxes. With this pronouncement of the law, we have no contention, but that rule is not applicable here. Neither Ruby nor Woods, when they obtained the alleged tax title, was a mortgagor, nor claimed under a mortgagor, nor was any duty resting upon either of them to pay the taxes, nor did they neglect to discharge any duty which either owed the mortgagee. The right to redemption which vested in Ruby, was transferred to Woods before the latter took the quit-claim deed, in which there was nothing obligating him to pay the indebtedness secured by the trust deed to redeem the property from the tax sales, or to pay any taxes. He was not in possession claiming under or as the successor to the mortgagor, and when he acquired the right he owed no duty to the mortgagee to pay any liens which had accrued on the property. His tax title, or the right to redemption should this title prove to be void, was acquired by operation of law from a wholly independent source, and cast none of the above obligations upon him. The mere taking of a quit-claim deed from the mortgagor afterwards, did not operate to deprive him of any right theretofore acquired. Taking a quit-claim deed under such circumstances, did not alter, change, transform or in some mysterious manner convert his right to redemption and reimbursement into a redemption.

Where one who is under no obligation or duty to the mortgagee to pay the taxes, acquires a tax title, and afterwards takes a quit-claim deed from the mortgagor, it does not destroy nor defeat the tax title or the right to redemption based thereon, and no authority has been cited, so holding. Authorities have been cited holding that one in possession as successor in title to the mortgagor, whose duty it is to pay the taxes, could not neglect the duty and defeat the mortgage by acquiring a

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tax title; but as we have said, they do not apply to this case.

Woods rested his claim of adverse possession upon the tax deed. When that was pronounced void, he claimed the right to redemption and reimbursement, which the parties agreed was of the value of $939.58. The judgment will be affirmed.

Affirmed.

Chief JUSTICE GABBERT and Mr. JUSTICE SCOTT concur.

Decided February 1, A. D. 1915. Rehearing denied April 5, A. D. 1915.

[No. 8157]

UNION TRADING COMPANY ET AL. v. DRACH ET AL.

1. EVIDENCE—*Competency.* Replevin for a warehouse and certain machines and machinery. The plaintiffs claimed under a sale of certain properties of a bankrupt corporation, made pursuant to an order of the referee in bankruptcy. The order recited that the stockholders had prayed that the real estate should not be sold, "which request was granted." *Held* the fact that the corporation carried the warehouse on its books as real estate, was competent to show what the stockholders had in mind in petitioning for the exclusion of the real property from the order of sale. (554)

2. ——*Effect.* Replevin for a warehouse, plaintiff claiming under a sale of the properties of a bankrupt corporation, made pursuant to the order of the referee in bankruptcy. The only words of description in the order which could be construed to include the property in question were "fixtures and equipment." The referee in bankruptcy, previous to the sale, caused an appraisement to be made of the warehouse and equipment, and other items, of much less value. Subsequent to the sale the referee ordered a second appraisement of the identical properties in controversy. These circumstances

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were accepted as tending to prove the absence of intention on the part of the referee, or the court in bankruptcy, to include in the sale the warehouse and equipment. (555, 558)

That subsequent to the sale the purchaser negotiated with the trustee in bankruptcy for the rental of the warehouse, stating what, in his opinion, would be a fair rental, and making no claim that it was included in the purchase, was accepted as negativing the claim of plaintiffs. (556, 557)

3. JUDICIAL SALE—*Defined.* Is one made under the process of a court having authority to order it. The court is the vendor, and the officer conducting the sale is the mere agent of the court. (558)

4. ——*Caveat Emptor*, applies to judicial sales. (558)

5. ——*General Description* of the property sold, when followed by a more particular enumeration, the latter governs. (559)

Error to Garfield District Court.—Hon. JOHN T. SCHUMATE, Judge.

Messrs. BURGESS & KINARD, and Mr. STRAUD M. LOGAN, for plaintiffs in error.

Mr. JAMES C. GENTRY, and Mr. J. W. DOLLISON, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action in replevin. The property involved is described as follows:

"One warehouse 40x100 feet in size, two stories in height and basement, said warehouse being of the value of Twenty-five Hundred Dollars, and one motor and grain separator, the same being in said warehouse, and of the value of Three Hundred Fifty Dollars; one grain elevator, the same being in said warehouse, and of the value of Ninety Dollars; one pair of Wagon Scales of the value of Seventy-five Dollars; one pair of Platform Scales of the value of Twenty-five Dollars; three two-wheeled trucks of the value of Fifteen Dollars; one pair

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of four-wheeled trucks of the value of Fifteen Dollars; two sack holders of the value of Two Dollars, and two patent crowbars of the value of Three Dollars all of the aggregate value of Thirty-one Hundred and Fifty ($3150.00) Dollars, and that said personal property was and is on the following described land, in Garfield county, Colorado, to-wit:

Commencing at a point 64 feet at right angles northerly from the center line of the main track of the Denver & Rio Grande Railroad Company, at Rifle Station, and opposite a point on the said center line of 300 feet westerly along said track from the westerly end-line of the depot building, at said station, thence westerly parallel with and 8 feet northerly from the center line of said railroad company's house track 200 feet, thence at right angles northerly 100 feet, thence at right angles easterly 200 feet, thence at right angles southerly 100 feet, to the place of beginning."

The trial court rendered judgment in favor of plaintiff below, defendants in error here.

Prior to the 12th day of December, 1911, the Union Trading Company, defendant below, was the exclusive owner and in possession of this, among other property. The said corporation was then engaged in the general merchandise business, among other enterprises, at several points within the state, including the town of Rifle, where the property in dispute was situated. On the latter date the corporation was declared a bankrupt, and one W. C. Weaver was appointed receiver, and later during said month of December, 1911, was appointed trustee in bankruptcy.

On the 27th day of January, 1912, S. D. Trimble referee in bankruptcy, ordered a public sale of certain of the property of the trading company, by the trustee, and which sale was held on the 17th day of February, 1912, at the Federal Court building in Pueblo. The de-

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fendants in error purchased certain of the property of the trading company, located at the town of Rifle, and at other points, and claim title to the property in con troversy, as being included within such sale. The property of the trading company was advertised and sold at such sale, as consisting of fourteen different lots. The claim of Drach & Co. plaintiff below, to title is based on the sale of Lot No. 1, described as follows:

"Lot No. 1, Parcel A. Merchandise at Rifle, Colorado, Inventoried valuation..... $25,035.87

Parcel	B.	Fixtures and equipment.....	799.80
"	C.	Bills receivable, appraised.....	2,471.97
"	D.	Open accounts, appraised.....	1,131.66
"	E.	500 shares of the capital stock of the Rifle Ice & Storage Co., par value..	25.00
"	F.	25 shares Rifle Light, Heat & Power Co., par value.....	25.00
"	G.	60 shares Rifle Creek Te. Co., par value	60.00
"	H.	1000 shares Rifle Creek Mercantile Co., par value.....	1,000.00
"	K.	All cash and cash items to date of sale."	

This property so described as Lot No. 1, was purchased by Drach & Company at the sale and in the lump for $12,000.00. Under the order of sale the Trustee in Bankruptcy was authorized:

"To advertise and offer for sale, and to sell, subject to confirmation by order of this court, certain of the property of said bankrupt corporation hereinafter described, at public sale, at auction, to the highest and best bidder for cash, and that he keep an accurate account of the amount offered for each lot or parcel offered, and the price offered for each parcel and for each lot, and by whom offered; and that, after offering each parcel separately, he shall offer all of the parcels comprising one lot, together, and so continue offering each

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parcel of each lot and each lot separately until he has received bids upon and for all of the personal property of the company pertaining to each store, or place of business, and shall report to this court the bids received by him and ask confirmation by order of this court of the sales; that for the purpose of such sales the property of the said bankrupt corporation shall be divided into lots and parcels as follows:"

The order then specifically described the fourteen lots, including Lot No. 1, sold to Drach & Company, and exactly as above set forth.

The advertisement of sale recites that the trustee will "offer and expose for sale to the highest and best bidder for cash the following described of the appraised property of The Union Trading Company as follows, to-wit." Then follows the description of the property to be sold, as in the order of sale. The order of confirmation recites that the trustee did offer and expose for sale at public vendue:

"Each and every parcel of each and every lot as advertised. * * * That after offering each parcel of each lot and each lot separately, and after re-offering same to the bidders present, this Trustee accepted as the highest and best bids or offers for each of said lots, the following: Lot No. 1, Rifle, E. E. Drach, $12,000."

In the order of sale, it is recited that the stockholders in the petition for an order of sale had requested that the real estate of the company and certain bills receivable, be not sold for the present, and that such request had been acquiesced in by the creditors, and was granted.

The defendant below offered to show that the trading company had carried the warehouse on its books as real estate, which offer was denied by the court. If this property was so carried on the books of the company, it is a circumstance to show what was in the minds of

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the stockholders when they asked the court not to include the real estate in the order of sale.

There does not appear to be any fact in the record tending to show that the property involved, or any part thereof was intended by the petitioners, or the court, to be included in the sale. Clearly, no part thereof was mentioned, nor included in the specific lists of property, either in the order, or in the published advertisement of sale. The trial court found as a fact that "the warehouse and other property mentioned above is not particularly mentioned either by name or by amount of appraisement in said order of sale, unless such amount was embraced in Parcel 'A' of Lot '1'." That the warehouse was not included under the head of merchandise when the fixtures and equipment of the store were appraised and described separately from the merchandise, is too plain to admit of contention.

The only testimony upon which the defendants undertake to rest their claim is that the purchasers believed that the property was included in the sale. As against this is the fact that Mr. Drach says that before the purchase he had knowledge of the descriptions in the order and advertisement.

In addition to this the record contains the following undisputed state of facts. Mr. Weaver, the trustee, testified:

"Q. I will ask you whether after the sale or on the date of the sale and after the sale you had any conversation with Mr. Drach with reference to the leasing of the property in controversy? A. Yes, sir.

Q. State where, in what place and at what time you had a conversation with Mr. Drach relative to the leasing of the property in controversy? A. At my office in the Opera House block after the sale. All of the buyers were present there getting their orders for delivery and Mr. Drach was among them, and I believe

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was leaving that night and the question of rents was spoken of and I told him I would consult with Judge Trimble and let him know later, which I did, wrote him on Monday in regard to the rents.

Q. Did you in following up this conversation write a letter to him regarding the rents? A. Yes, sir.

Q. I hand you defendants' exhibit 2 and ask if that is the letter that you refer to? A. That is the one."

The letter referred to was dated February 19th, 1912, and contained the following:

"In regard to the rents, would suggest that in our opinion $1200 for the Meeker; $600 *for the Rifle warehouse,* and $300 for the Rulison store would be about correct."

It will be noted that the Drach firm purchased the three stocks of goods at Meeker, Rulison and Rifle, and that the rent mentioned was for property at Meeker and Rulison and the warehouse at Rifle, the rent for such warehouse being specifically stated to be $600 per annum. Further, that the total of these rents proposed was $2100 per annum or $175 per month.

Again, on March 20th, 1912, Mr. Weaver again wrote Mr. Drach concerning these rents as follows:

"There will be a meeting tomorrow to decide the entire future of the Trading Company, and as we have charged you with the rents as per former letter, $175 for the month, we will await result of said meeting before making final settlement, and will then advise you as to who you will have to deal with in regard to leases."

In reply to these letters Mr. Drach wrote Mr. Weaver on March 23rd, as follows:

"I note your observations as to rentals, and beg to state that in our opinion the amount of $175 is entirely too much, but presume this matter can be easily adjusted between us at the proper time."

Mr. Drach made no claim of ownership of the ware-

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house at that time, though the letters of the trustee to which he then replied, both claimed rent for the warehouse at the rate of $600 per annum.

As further throwing light on the intention of the court, it appears that on the 18th day of December, 1911, the Referee in Bankruptcy ordered an appraisal of the property at Rifle and the appraisers filed their report on the 26th day of December, 1911, appraising such property as follows:

"Warehouse and Equipment on Railroad Right of Way.....$ 3,750.00
Notes as per list attached..... 2,471.97
Accounts per list attached..... 1,131.66
Merchandise per list attached..... 18,505.82
Equipment in Store, per list attached..... 799.80"

It will be seen that the property here involved was then separately appraised as: "Warehouse and Equipment on Railroad Right of Way, $3750.00."

Clearly, the court could not have intended to include property of such value and description without some appropriate mention in the order of sale, wherein he specifically set forth items of much less moment.

Again and after the sale to Drach & Company, the Referee in Bankruptcy, on the 6th day of March, 1912, ordered an appraisal of the specific property involved, and the report of the appraisers made on the 11th day of March, 1912, shows the value of the particular property to be $2250.00.

If the court had intended to, and did sell the specific property to Drach & Company, on the 17th day of February, 1912, why did he order an appraisement of such property, on the 6th day of March following.

There was no appraisement of the property conceded to have been included in the sale at that time. Why should he order an appraisement of property theretofore sold and delivered, and for which payment had been

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made. Nothing is plainer than that the court did not intend to sell the property involved to Drach & Company. So that in the most favorable light for the defendants in error, the facts are that the order of the sale and the advertisement of sale specifically described the property to be sold, and that none of the property involved in this case was included within such description; that it was not intended to sell all of the property of the Union Trading Company.

There is no evidence tending to show that the stockholders, creditors or the court intended to sell the property involved, though the defendants in error say they believed that such property was included. There is however, nothing in the record which seems to furnish a reasonable basis for such belief. What then are the rights of the parties under such state of facts.

It is conceded that the sale was in law a judicial sale.

"A judicial sale is one made under the process of a court having competent authority to order it, by an officer legally appointed and commissioned to sell; one made by a court of competent jurisdiction, in a pending cause through its authorized agent. A sale under an order or decree of court is a judicial act. The court is the vendor, and the officer conducting the sale is the mere agent of the court. The sale is a transaction between the court and the purchaser." 24 Cyc. 6.

In the sale under consideration there is no suggestion of fraud nor mutual mistake, and the maxim *caveat emptor* applies strictly to judicial sales. *Redd v. Dyer et al.* 83 Va. 331 2 L. E. 283, 5 Am. St. 272; *Long v. Wellers Executor,* 29 Gratt, 347.

The order of the court and the advertisement, included only "certain of the property of the bankrupt hereinafter described," followed by the specific description, which clearly did not include any of the property involved in this action.

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It may be said to be the universal rule that where property sold is described generally, followed by a more particularly enumerated schedule, the latter governs.

This doctrine is announced and the question exhaustively discussed by Mr. Justice Harlan in *Bock v. Perkins,* 139 U. S. 628, 35 L. Ed. 314, 11 Sup. Ct. 677. No authority has been cited to the contrary and we know of none. Under these well settled rules of the law as applied to the facts in this case, the judgment must be and is reversed.

GARRIGUES, J. and TELLER, J. concur.

[No. 8159]

STITT v. SPENGEL HOUSE FURNISHING COMPANY.

1. CHATTEL MORTGAGE—*Place of Record.* Where goods are sold in one county, to be immediately removed to another, and are so removed, the latter county is the *situs* of the goods, within the meaning of the statute (Rev. Stat. Sec. 515). A chattel mortgage to confer any lien as against creditors of the purchaser must be recorded in the latter county.—*Mumford v. Harris,* 8 Col. App. 51, overruled. (561)

2. STATUTES—*Construction.* A statute the purpose of which is to give notice of an encumbrance upon personalty should receive the construction best calculated to accomplish this purpose. (562)

3. WORDS AND PHRASES—*"Situated."* The direction that a chattel mortgage shall be recorded, "where the property mortgaged shall be situated," (Rev. Stat. Sec. 515), means where the property is permanently situated. (562)

Error to Denver District Court.—Hon. J. E. LITTLE, Judge.

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Mr. ROY E. DICKERSON, for plaintiff in error.

Messrs. THOMAS & THOMAS, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

April 27th, 1912, one Clyde Sill bought certain personal property from the Spengel House Furnishing Company, doing business in the City and County of Denver, to be by it forthwith delivered to the former's place of business at Aurora, in Adams County. Immediately upon making the purchase Sill gave a mortgage on the property to the vendor, which the latter recorded in the City and County of Denver, where the sale occurred, May 1st, 1912, four days after its execution. The goods had meanwhile been delivered by the vendor to Sill, in Adams County. July 12th, 1912, some of this property was seized by Stitt, as Constable, under a writ of attachment sued out of a Justice's Court in the latter county, by the Midland Casket and Manufacturing Company, upon a claim against Sill. Thereafter the Spengel Company brought this action in the District Court of the City and County of Denver, to recover from the Constable, Stitt, the sum of $432.15, the alleged value of the goods, theretofore attached, and subsequently sold by him as the property of Sill. Upon trial the Spengel Company, on the strength of its recorded mortgage, recovered judgment for $321.16, and the Constable, Stitt, prosecutes this writ of error, questioning the validity of the mortgage recorded, as it was, only in the City and County of Denver, to hold this property against the attachment.

The court below held that, as the goods were sold to Sill, in the City and County of Denver, and the mortgage executed before they were removed, and recorded there prior to the levy of attachment in Adams County, such record was constructive notice. Where personal

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property is sold in one county for immediate delivery to and permanent location in another county, and is so delivered, where must a chattel mortgage on the property, given at the time of purchase and sale, be recorded to protect the vendor through constructive notice?

The sections of the statute for consideration are as follows:

"No mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and recorded, as hereinafter directed." § 512, R. S. 1908.

"Any mortgage of personal property so certified, shall be admitted to record by the recorder of the county wherein the property mortgaged, or the greater part thereof, shall be situated," etc. § 515, R. R. 1908.

The court was no doubt governed, in its determination of the place of record of the mortgage under consideration, by the decision in *Mumford v. Harris,* 8 Colo. App. 51, 44 Pac. 772, where, construing these sections, it was held that the *situs* of mortgaged property, for the purpose of record is the county where the property is located at the time of the making of the mortgage. In that case it was so held notwithstanding the mortgage showed on its face that the property was to be forthwith removed and kept in a county other than the one in which it was located when the mortgage was executed. Under the facts, that conclusion is manifestly wrong, and a clear perversion of the plain intent and meaning of the act, the object of which is to prevent fraud and deception by precluding the mortgagor of personal property from holding himself out to the world as an unqualified owner. *Horner v. Stout,* 5 Colo. 166. Plainly this can only be accomplished by recording a lien against the property in the county where it is located and kept, not by making

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such record in the county whence the property came. Provisions of this character should be given that construction which is best calculated to accomplish their obvious purpose. The Mumford-Harris decision, *supra*, held that the words of our statute "shall be situated" indicates the *situs* of the property at the time of execution of the mortgage, which so restricts the operation of the act as to permit, rather than hinder, fraud and deception, by making time the controlling consideration. If the statute is to have force and effect consistent with the apparent legislative intent, as gathered from its context, the words "shall be situated" must be held to mean permanently situated. Where, as here, mortgaged property is sold in one county, to be forthwith delivered to the place of business of a purchaser in another county, and is delivered there, its *situs* for the purposes of record of a mortgage placed on it is in the county to which it is so delivered. Any other construction would defeat the purpose and object of the statute as to notice, and thus afford opportunity for the perpetration of fraud and deception, to prevent which was the primary object of the act.

Accordingly, the record of the mortgage to the Spengel Company, in the City and County of Denver, under the circumstances of this case, was not constructive notice to an attaching creditor in Adams County, where the property was permanently located and found.

The judgment is reversed and cause remanded, with directions to dismiss the action at plaintiff's cost.

Decision *en banc*.

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[No. 7761]

STEWART ET AL. v. TALBOTT ET AL.

1. MECHANICS LIEN—*To What the Lien Extends—Improvements by Tenant—Statute Construed.* The lien given by § 4025 R. S. 1908, to mechanics, material men, etc., and persons performing labor or furnishing materials for the construction of any building, etc., upon the property upon which they have rendered service or bestowed labor, or for which they have furnished materials, etc., at the instance of the owner or any person acting by his authority or under him as agent, contractor or otherwise, for the value of such work, labor, services or materials, primarily extends only to the structure or improvement placed upon the land. (570, 571)

2. ——*Statutory Agent—Improvement—Land.* The provision of § 4025 R. S. 1908, that "every person having charge of the construction * * * of any building * * * shall be held to be the agent of the owner," confers upon the person so in charge the character of statutory agent of the one erecting the structure or improvement, but does not constitute him the agent of the owner of the land upon which the improvement is placed. (570)

3. ——*When Lien Extends to Land.* By virtue of R. S. 1908, § 4027, the lien provided for by R. S. 1908, § 4025, may extend to the land upon which the structure or improvement is placed, but can attach only when the owner of such land has some ownership in the building or improvement, and acts affirmatively relative to its construction or repair. (571)

4. ——*Where Notice of Non-liability from the Landlord is Required.* § 4029 R. S. 1908 applies only to the case of an improvement made without authority of the land owner, and where, after its progress comes to his knowledge, he fails to give notice to those engaged in the work, disclaiming liability. *Grimm v. Yates, ante* followed. *Shapleigh v. Hull*, 21 Colo. 419, distinguished. (574, 576)

5. ——*Inception of Right to Lien—By Contract, or Estoppel.* The inception of, or right to a lien under R. S. 1908, § § 4025, 4027, grows out of contract; under R. S. 1908 § 4029, it arises from estoppel. (574)

6. LANDLORD AND TENANT—*Improvements—Leasehold and Fee.* The mere inclusion in a lease of a covenant to build does not of itself render the lessee either the agent or contractor of the lessor so as to bind the latter's interest with a lien. The improvement must be of such a character and extent, or made under such circumstances, as to show that it was made either by the lessor acting through the

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lessee as his agent, or as the joint undertaking of both, before the lessor's interest in the land can be bound. (584, 587)

7. ——*Rule Applied.* A lease was granted for the term of 99 years, and provided that the tenant should, at his own expense, erect and complete a building to cost not less than $150,000, and thereupon the building and improvements should at once become a part of the realty. The landlord took no part in the erection of the building, having nothing to say as to the architecture, plans, or material, and there was no allegation or proof that the rents reserved were greater than the reasonable value of the premises. The lease was recorded on the day succeeding its execution, and was brought to the attention of the party contracting with the tenant. *Held* that the estate of the landlord was not chargeable with the lien. (587)

8. ——*Lease—Construed—Presumption.* The provisions in the lease, which was duly recorded, that nothing therein should authorize or empower the lessee or any person dealing with him to charge the fee, or any interest of the lessor therein, with any mechanic's lien or encumbrance of any kind, nullified and destroyed any presumption that the lessee was the agent of the lessor within the mechanic's lien laws, and constituted constructive notice to those subsequently acquiring an interest in the premises as to the power and authority of the lessee therein, and no lien could attach to the lessor's interest, not solely because of the stipulation in the lease forbidding it, but because the facts show that the lessee in making the improvements did not act as the agent of lessor, and the improvements were not made at the latter's instance. (588, 589)*

MUSSER, C. J. concurred, but resting his conclusion solely upon the clause of the lease that nothing should authorize the lessee to charge any interest of the lessor in the demised premises with any lien or encumbrance. The lessee, his honor said, was not of the class mentioned in Rev. Stat. Sec. 4025; the agency of the lessee, if any existed, was created by the lease, and was, of course, subject to the limitations there set down; that those dealing with him, having notice of those limitations, must at their peril observe and keep within the limits of his authority; that the lien laws of this state do not render such a stipulation between lessor and lessee void or ineffective; any such legislation, if constitutional, which his honor seems to doubt, must declare the prohibition by express words, or necessary implication.

As to the notice required by Rev. Stat. Sec. 4029, his honor said it could not be required as to anyone having already notice that the lessor's interest was not chargeable, and the record of the lease, authorized by Rev. Stat. Secs. 694, 707, was notice to all the world that the lessor's interest was not to be subjected to a lien, for any improvements made by the lessee.

*Syllabus by WHITE, J.

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Error to Denver District Court.—Hon. GEORGE W. ALLEN, Judge.

On Rehearing.

Messrs. ROBINSON & ROBINSON, Messrs. DINES, DINES & HOLME, Messrs. BENEDICT & PHELPS, Messrs. BARTELS, BLOOD & BANCROFT, Mr. RAYMOND J. MCPHEE, Mr. L. WARD BANNISTER, Mr. L. MCWHINNEY, for plaintiffs in error.

Mr. C. H. REDMOND, Messrs. GOUDY & TWITCHELL and Mr. J. H. BURKHARDT, for defendants in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

Talbott and Mugivan, defendants in error, owners of four lots on Champa street between Fourteenth and Fifteenth streets in the City of Denver, entered into a written contract by which they leased them to The American Music Hall Company, a corporation, for the term of ninety-nine years. The lease contract provided, *inter alia.* "That on or before the first day of July, A. D. 1910, the lessee will proceed to improve said premises by the erection, construction and maintenance of a building covering said premises, said building to cost, when completed, not less than one hundred fifty thousand dollars ($150,000.00); * * * and to be fully completed on or before the first day of January, A. D. 1911; * * *. All buildings and improvements of every nature soever erected or placed upon said premises, when commenced and completed, shall at once become a part of the realty of the lessors, without right or authority of any person or corporation to remove the same, "provided, the lessee may alter, remodel, improve, repair or reconstruct the same at its pleasure, but not so as to

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impair the value thereof; that at all times throughout the term of the lease the lessee shall maintain upon the said premises a building of the aforesaid character." The rental reserved to January 31, 1911, was $3,000. paid simultaneously with the execution of the lease, and $500. per month thereafter payable on the first day of each month, and the payment of taxes, assessments and governmental charges imposed upon the premises. The lessee was required to keep the improvements and fixtures insured, with the loss payable to the lessors, with the right reserved in the lessee in case of loss by fire to rebuild or repair, with reasonable diligence, the building so destroyed, and to use such insurance money therein. The contract obligates the lessee to bear all expense of the erection, construction, maintenance and operation of the building to the end that the rentals reserved to the lessors shall be met. Paragraph 6 thereof is as follows:

"It is expressly understood and agreed (and notice is hereby given), that nothing herein shall authorize the lessee or any person dealing through with or under it, to charge said lands, or any interest of the lessors therein, or this lease, with any mechanics lien, or lien or incumbrance of any kind whatever. On the contrary, (and notice is hereby given), the right and power to charge any lien or incumbrance of any kind against the lessors, or their estate, is hereby expressly denied, and the lessee covenants that it will not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid. The lessee shall, before commencing the erection and construction of a building on said premises, furnish or cause to be furnished a bond in a bonding company satisfactory to lessors, guaranteeing the due observance of this clause 6."

April 15, 1910, the lease was filed for record and

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duly recorded in the office of the county clerk and recorder of the county in which the lots are located, and thereupon possession of the premises delivered to the lessee. April 20, 1910, the lessee entered into a written agreement with James Stewart & Company, one of the plaintiffs in error, whereby the latter, acting as the agents of the former, who were therein designated as the owner, agreed "to build for the said owner a building to be used chiefly for theatrical productions on the premises leased by the owner from" Talbott and Mugivan, the defendants in error, describing the particular lease here in question, designating the book and page where it is recorded. The building was to be erected according to plans and specifications prepared by a designated architect representing "The American Music Hall Company as the owner of the premises." It authorized Stewart & Company to obtain prices and estimates for building materials and work that might be required in the erection of the building, and to submit to the architect a complete list of bids received, together with their recommendation thereon, and to "prepare proper and satisfactory contracts covering the same for execution by the owner or its authorized agent", containing a proviso that Stewart & Company might do and perform each particular portion of the work as might be determined by themselves, the architect and the owner, as most expedient. The American Music Hall Company was to furnish the necessary funds to carry on the work and pay Stewart & Company, for superintending the same, a percentage compensation depending upon the cost of the building. Bids were thereupon received for various portions of the work, and The American Music Hall Company, as owner, entered into written contracts therefor as follows: with F. H. Cowell for the brick work; with the Colorado Portland Cement Company for the cement; with Hugh Murphy for rock. A like contract

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was prepared by Stewart & Company for execution by The American Music Hall Company, as owner, and the John Eichleay, Jr., Company, as contractor, for the structural steel, but, though approved by the architect, was never signed by either of the contracting parties. McPhee and McGinnity Company, a corporation, without any written contract, but upon orders from Stewart & Company, furnished certain lumber which was used for concrete forms, piling for shoring up adjacent ground and supporting the foundations of buildings jeopardized by the excavation. Work upon the structure proceeded for a while but certain bills became due and payable, and, default having been made therein, the work ceased early in August. Stewart & Company superintended that which was done by others, did a portion of the excavating, put in the concrete footings, placed some structural steel in the foundation, etc., paid certain bills; and herein claim a lien on the premises for $14,059.30 less $4,129.02 paid to them by the American Music Hall Company. The John Eichleay, Jr., Company fabricated and shipped to Denver from its works in Pittsburg, Pennsylvania, consigned to The American Music Hall Company, ten cars of structural steel. Of these, five cars were delivered on the premises and incorporated into the foundation and basement portion of the intended building; the other five cars were tendered by the railroad company at Denver but were never received by Stewart & Company or The American Music Hall Company or delivered upon the premises, but remained in the possession of the railroad. The Eichleay Company also prepared, or partially prepared, other structural products ready for shipment for use in this building. It filed four separate lien statements. The first statement is for structural steel delivered to and incorporated into the structure, and is in the sum of $6,812.83. The second is for structural steel fabricated and shipped to Den-

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ver for use in the structure, but never delivered to, nor incorporated therein because of a cessation of work thereon, and is in the sum of $7,316.10. The third statement is for certain steel either fabricated or partially so at Pittsburg, but not shipped because of cessation of work on the structure, and is in the sum of $7,840.69. The fourth statement is for steel designed for the structure but never cut, and for details made and bills of materials written for the work, and is in the sum of $1,088.86. F. H. Cowell claims a lien for $2,332.65 for brick, cement and sand furnished and placed in the basement walls. The Colorado Portland Cement Company furnished cement which was used in the foundation work of the building and claims a lien for a balance in the sum of $665. Hugh Murphy furnished crushed stone which was mixed with the cement and used in the foundation, and claims a lien therefor in the sum of $246.90. McPhee and McGinnity Company claims a lien for the material hereinbefore designated as furnished by them in the sum of $495.80. At the time work ceased the excavation for the basement had been partially completed and a large portion of the foundation of the building constructed. Subsequent to the filing of the liens, but prior to the institution of the foreclosure proceedings, the lessors, after notice to the lien claimants of their intention so to do, forfeited the lease under the terms thereof and took possession of the premises; and the sole question here involved is the right of plaintiffs in error to fasten their respective liens upon the title of the lessors in and to the lots. The right claimed was denied by the trial court and the purpose of this action is to reverse that judgment.

Plaintiffs in error claim that they are entitled to, and may maintain their respective liens either under the provisions of § 4025 or those of § 4029, R. S. 1908.

§ 4025 gives, to the persons therein designated, "a lien upon the property upon which they have rendered

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service or bestowed labor on for which they have furnished materials * * * for the value of such services rendered or labor done or material furnished," upon the condition, however, that they acted in that regard "at the instance of the owner" or of some person acting by his authority. Clearly here the word "owner" has reference to the word "property", and the latter signifies the character of the structure or improvement designated in the first part of the section, that is, building, mill, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagonroad, tramway or other structure or improvement upon land to which a lien attaches solely by virtue of this section. In other words, by this section the lien is given upon the structure or improvement built or placed upon the land. That this is the meaning of the section is made certain by its other provisions and that of the act. Further in the section the right to the lien is restated upon the same condition as above specified, except the word "owner" is followed immediately by the words "of the building or other improvement"; that is, the lien is given when, and only when, the work is done or services rendered or materials furnished "at the instance of the owner of the building or other improvement, or his agent." Moreover, the section contains the declaration that every "person having charge of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act", clearly meaning that the person having charge of the construction of the building or improvement, etc., is the statutory agent of the owner of the building or other improvement, but he is not thereby made such agent of the owner of the land upon which the improvement is placed. It is only by § 4027 that the land whereon such building, structure or improvement may be made, is subjected to the liens provided by the act. Therefore, ownership of the build-

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ing, structure or improvement, and the doing of the work thereon or the rendering services or furnishing material therefor at the instance of such owner or his agent, plus ownership in the same person of the land upon which such structure or improvement is erected or placed, are essential, under §§ 4025 and 4027, to the validity of a lien upon such land. This meaning is further evidenced by subsequent provisions of the latter section. It constitutes the lien, where it is for work done or material furnished for an entire structure, erection or improvement, superior thereon to prior liens or incumbrances of the land upon which the same is erected or placed, and authorizes in the enforcement of such lien the sale of such improvement and the removal of the same from the land upon which it stands. It further provides that the lien given by the act shall extend to any "conveyable interest of such owner or reputed owner in the land upon which such building, structure or improvement shall be erected or placed," or that he may thereafter acquire subsequent to the making of the *contract* or the commencement of the work upon such structure and before the establishment of such lien by process of law. It, therefore, follows that under § 4025, coupled with § 4027, it is a condition precedent to the validity of the lien that the person, whose interest in the real estate it is proposed to bind or affect thereby, must have acted affirmatively relative to the structure or improvement placed upon the land, and must have some ownership therein.

In *Cornell et al. v. Barney et al.*, 94 N. Y. 394, 398, under a statute in substantial effect the same as our §§ 4025 and 4027, materials were furnished by plaintiffs to a lessee, (Salem), for an improvement in process of construction by the latter in pursuance of provisions in his lease by which he covenanted to erect a permanent building on the demised premises of, at least, a specified value, within a designated time, and in which the lessor, (Barney), covenanted to loan a specified sum as

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the building advanced, to be secured by mortgage on the lessee's interest in the premises, and the building, upon the termination of the lease, to revert to and become the property of the lessor. The right to the lien was denied on the interest of the lessor for the reason that the material for which the lien was claimed was not furnished under any contract with him or at his instance, and that he did not cause the building to be constructed. Upon this point the court, at page 398, said:

"Section 1 of the Lien Act, applicable to the city of New York (Chap. 379 of the Laws of 1875), provides that 'every person performing labor upon, or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien on the same for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building improvement, or his agent.' To give a lien under this section, the work must have been done or materials furnished at the instance of the owner of the building or the improvement, or at the instance of his agent, and the lien is upon the building or other improvement. Such is the plain language, and there is no room for construction. Here the iron was not furnished at the instance of Barney. His contract with Salem did not even require any iron to be used in the erection of the building, and it does not appear that he had anything whatever to do with Salem's contract with the plaintiffs, or with the procurement of the iron from them, or that he knew anything about it. It is true that Salem covenanted with Barney to erect the building, and that Barney agreed to advance money to be applied toward the erection of the same, and that he was to have a mortgage on the same; yet the building was not erected for Barney, and was not, before the termination of the lease, to belong to him, and in no proper sense could the material furnished for the same be said to be furnished at his instance. In harmony with this view is section 2

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of the act which provides that 'any person, who at the request of the owner of any lot, etc., grades, fills in, or otherwise improves the same, or the sidewalk or street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished.' Here the word 'request' is used in substantially the same sense as the word 'instance' in the prior section, and was intended to have the same scope.

Section 1 having provided for a lien upon the building, section 3 provides for a lien upon the lot upon which the building stands, as follows: 'The land upon which any building, etc., is constructed, etc., shall be subject to the liens if at the time the work was commenced or materials for the same had commenced to be furnished, the land belonged to the person who caused said building, etc., to be constructed, etc.; but, if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien.' The plaintiffs can have no lien under this section upon Barney's interest in the land, because he did not in any proper sense cause the building to be constructed. Within the meaning of this section the building must be constructed for and at the expense of the owner of the land or under contract with him. Salem caused this building to be constructed, and the plaintiffs could have a lien upon his interest in the land under his lease."

This is not the case, however, under § 4029, coupled with § 4027. Thereunder a lien may attach to the lands of a person or his interest therein by his non-action, coupled with his knowledge that the building or structure was erected upon or removed to his land, or, being thereon, was altered, added to or repaired. Indeed, it does so attach under such circumstances, unless he is excluded from the application of the mechanic's lien law by reason of the provisos in the section, or within five days after he shall have obtained knowledge of the work or the intention to do the same he gives notice as re-

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quired therein that his interest shall not be subject to any lien for such work. The controlling distinction in this respect between § § 4025 and 4027, on the one hand, and § § 4029 and 4027 on the other, is, as hereinbefore stated, that in order to fasten a lien upon a person's interest in real estate under the provisions of the former sections, such person must have some ownership in the improvement constructed, etc., and must have, as such owner, contracted to have the same erected, either directly or through an agent thereunto authorized; while under the provisions of the latter sections, such contractual relation can not exist; and the ownership in the structure or improvement essential to the validity of the lien is invested in the owner of the land by operation of law. In other words, the inception of the right to a lien under § 4025, coupled with § 4027, grows out of contract; while under § 4029, coupled with § 4027, it arises from estoppel. Nor is this distinction affected by the declaration in § 4025, that in default of filing the contract for the work, or a memorandum thereof, as therein required, the labor done and materials furnished by the parties named, prior to the filing of the same, shall be deemed to have been done and furnished at the personal instance of the owner, and the person furnishing the same shall have a lien for the value thereof. It is still the affirmative contractual relation of the owner of the property to the improvement made or work performed upon which the claimant's right to the lien is based, and the effect of the default of the owner as to filing the contract or a memorandum thereof only removes the statutory restriction that the lien can extend only to the contract price and enlarges the right in that regard under the principle of estoppel so as to cover the value of the work performed or material furnished. Indeed, in *Grimm v. Yates, ante* 268, decided at this term, we expressly declared that the purpose of § 4029 "is to require an owner, where another in possession of his prop-

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erty is making improvements, which by the terms of the agreement between the owner and the party in possession, the latter is without authority to make, to give notice to those performing labor or furnishing materials for such improvements, within five days after he shall have obtained knowledge that they are being constructed, that his interest in the property, upon which such improvements are being placed, shall not be subject to any lien therefor, and that his failure to do so renders his interest subject to a lien for such improvements."

Applying the law to the facts of this case it follows that the liens sought to be established and enforced herein can not be sustained under § 4029 as affected by § 4027. The defendants in error were under no obligation by virtue of those sections to give or post the notice therein required. They were in no wise engaged in constructing the improvement but had entered into a contract with reference thereto; and were, therefore, by the very letter of a proviso of the section not of the class to whom the section applies but of a class expressly exempted from its terms. Moreover, the lessee was the party in sole possession of the premises and was making no improvement thereon which the terms of its lease and contract with the defendants in error did not authorize it to make. The contract here involved possesses no element of that described in § 4025, *supra,* as a contract between the "owner" and a "contractor." By its terms nothing was to be paid by defendants in error but the work was to be done by the lessee at its own expense; and the acts of plaintiffs in error relative to the improvement were caused by the lessee and not by the lessors. Moreover, defendants in error were not the reputed owners of the structure or improvement, but, on the contrary, the lessee, in the contracts with plaintiffs in error, was designated as such owner. It can not be seriously claimed that under the agreement the lessee contracted with the lessors to furnish materials or perform any of the labor or services

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named in the foregoing section of the statute, by the doing of which it would, by that section, be known as a "contractor." A contractor is "one who as an independent business undertakes to do specific jobs of work without submitting himself to control as to the petty details."

Plaintiffs in error, however, contend that the well recognized rule declared in *Shapleigh v. Hull,* 21 Colo. 419, 425, 41 Pac. 1108, is applicable to the facts of this case, and that their liens attach to the fee of defendants in error in the premises by virtue of the provisions of § 4025. We held in that case that where a contract of sale of real estate expressly requires the vendee to make improvements thereon, the interest of the vendor in the land is subject to the Mechanic's Lien Law for the improvements so made. Whether the rule should apply and subject the title of the lessor to a lien where the lease requires the lessee to make permanent improvements upon the leased premises of not less than a stated value, without other conditions or limitations, has never been determined in this state. In *Antlers Park R. M. Co. v. Cunningham,* 29 Colo., 284, 286, counsel contended for the application of the rule but it was found unnecessary to decide the point therein. *Williams v. Eldora-Enterprise Co.,* 35 Colo., 127, 130. That there is a clear distinction between the principles involved in the two classes of contracts is obvious. In the former the estate dealt with is one entity, and the contract of sale, containing the building requirements, can and does relate to no other thing. The vendor having required the vendee to erect the structure on the only estate that existed, and of which he was still the owner, the improvement likewise is his within the meaning of the law, and such owner's interest in the premises, by the terms of the statute, is, therefore, subject to the lien. There being but one estate in the land and both the vendee and vendor having an interest therein, the ownership of the permanent improvement placed thereon is likewise in both and the vendee in making the

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improvement is necessarily the agent of the vendor. Under a lease, however, the estate is divided into term and reversion, and so is the ownership of the thing. In fact, there are two entities: the leasehold estate and the reversionary estate, with either of which, it would seem, parties should be permitted to deal independently of the estate of the other, and when they do so their rights and obligations in the premises, except as affected by statute based upon the doctrine of estoppel, should be measured accordingly. However, could it be said that this distinction does not logically exist, it is, nevertheless, certain that the mere fact, that the terms of a lease obligate the lessee to place permanent improvements upon the premises at his own expense, does not, of itself, constitute him the agent of the lessor in the erection of such improvements. The rule is clearly stated in *Atlas Portland Cement Co. v. Main Line Realty Co.,* 112 Va. 711; 70 S. E., 536, 537, as follows:

"It is insisted that the appellants' claims are liens upon the lessor corporation's interest in the lot, because the lessee corporation was in effect the agent of the lessor in causing the building to be erected on the lot. The evidence fails to sustain this contention, unless in a contract of lease, where the lessee is by its terms required to erect a building upon the leased premises, the latter becomes the agent of the lessor. It is well settled that such relation does not make the tenant the agent of the landlord, and that it does not give him the implied authority to create a lien upon the landlord's interest therein for improvements made thereon, unless the lawmaking power expressly or by necessary implication enacts otherwise."

Citing, Phillips on Mechanics' Liens, § § 89, 90; Boisot on Mechanics' Liens, § § 289, 291; Jones on Liens, § § 1273, 1276; *Mills v. Matthews,* 7 Md. 315; *Rothe v. Bellingrath,* 71 Ala. 55; *Harman v. Allen,* 11 Ga. 45.

In *Winslow Brothers v. McCully,* 169 Mo. 236, while the freehold interest was held subject to the mechanic's

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lien for improvements erected upon the premises by the lessee under a covenant in the lease obligating him to do the same, the holding was not based upon the covenant alone, for the court on page 244, says: that the mere fact "that the tenant has contracted with the owner to make certain improvements on the leased premises, does not make the land, or the landlord's interest in the land subject to a mechanic's lien. For in such cases the tenant acts for himself and not as agent of the owner."

And in *Lumber Company v. Morris,* 170 Mo. App. 212, 156 S. W. 75, based upon a statute requiring, as the ultimate foundation of the lien, a contract made with the owner of the land sought to be charged with the lien or with that owner's agent, it was held that the statute, together with the meré covenant in a ninety-nine year lease to make permanent improvements upon the leased premises, would neither constitute the lessee the statutory nor the contractual agent of the lessor in making such improvements. The court therein, on page 216, upon the latter point, used the following language:

"Now, can it be said that merely by reason of the fact that a lessee covenants with a lessor to make certain repairs and improvements which will become the property of the lessor at the end of the term, this necessarily makes the lessee the agent of the lessor so as to bind the latter's freehold interest with the lien for the materials used in the improvement? If so, then no matter what is the character and extent of the improvements, nor how strong the language of the lease denying to the lessee the authority to bind the lessor's interest with a lien, the latter will nevertheless be bound, because the lien is a creature of the statute; and whenever the lessee, in contracting for improvements, acts as the 'agent' of the lessor, within the meaning of that word as used in the statute, the freehold is bound by the lien regardless of the inhibitory terms of the lease."

The opinion cites with approval, *Albaugh v. Litho-*

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Marble Co., 14 App. Cases D. C., and quotes therefrom the following:

The covenant "involves no theory of agency, but quite the reverse. The parties to the lease dealt with each other, not as principal and agent, but practically as adverse parties. To hold that a lessor covenanting with the lessee for the security of his interest under the lease, the payment of rent probably, should construct a building upon the land in the place of one to be demolished, would thereby and by virtue of such covenant make the lessee his agent and bind himself personally, as well as his property, for the contract of the lessee in the performance of his covenants, seems to us to be wholly without warrant either in law or in reason; we greatly question whether even the most positive legislation could impose liability upon one person for the obligation of another in such a contingency. Certainly no such liability is sought to be imposed by our mechanic's lien law. The covenant in question is itself evidence of the intention of all the parties that the lessor should not be bound."

Under this view of the matter it becomes necessary to ascertain: (1), whether the statute here under consideration has expressly or by necessary implication constituted the lessee the agent of the lessor and invested him with the authority to create a lien upon the lessor's interest in the fee for improvements made upon the leased premises; or, (2) of the covenants in the lease, coupled with the other facts of the case, constitute the lessee the agent of the lessor in making the improvements for which the liens are claimed?

Mechanic's lien statutes of our several states give but little aid in construing our own. They differ greatly in their terms and are subject to frequent amendment, and different provisions of the same statute often seem inconsistent and a lien may be sustained under one provision when other provisions would seem to negative the right thereto. Moreover, courts have too frequently ap-

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plied, as controlling precedents, the broad reasoning and declarations of a decision made under one statute to the facts of a case arising under an entirely dissimilar statute. By reason of these things the decisions and reasoning of the courts can not always be accepted at their *prima facie* value, and should be cautiously considered and applied. However, much of the contradiction and confusion would disappear if the distinction between a contractual agent and a statutory agent, together with the particular facts of the case and statute under which such decisions were severally rendered, are kept clearly in mind in the consideration of each. Statutes giving liens for improvements made upon land "with the consent" or "with the permission" or "with knowledge" of the owner of such land, or where the owner of the land "knowingly permits improvements to be made" thereon, and statutes of like character, differ fundamentally from those where the lien must be founded on contract with the owner of the land. Under the former statutes the lien fastens upon the land through knowingly submitting or permitting it to be improved, plus the actual improvement thereof. These statutes, it would seem, discard the requirement of an actual contract and adopt the theory of estoppel. In other words, where by the statute the lien must be founded upon contract with the owner of the land, or his agent thereunto authorized by such owner, the true rule is that the lien claimant of a valid lien must establish, by proper proof, the fact that he is the contractual agent, either directly or indirectly, of such owner relative to the making of the improvement, or furnishing the material, for which the lien is claimed, while under statutes which fasten the lien by virtue of the fact that the improvements were placed upon the land "with the consent," "permission" or "knowledge of the owner" thereof, the person doing the work or furnishing the material therefor is essentially the statutory agent of the owner of the land who submitted or permitted it to be

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improved. Section 4029, *supra,* with the provisos thereof eliminated, is of the latter class, while sec. 4025, *supra,* is of the former class. The fact that the latter section declares that any person having charge of the construction of the improvement is thereby constituted the agent of the owner, in no sense nullifies the previous requirement, as affected by Sec. 4027, *supra,* that the construction of the improvement by the owner of the land or by his contractual agent is essential to the inception of a lien thereunder. This is true because by that section there can be no statutory agent until the owner, either directly or through some contractual agent thereunto authorized, has moved forward in the construction of the improvement. In other words, there can be no statutory agent thereunder until subsequent to the creation of a contractual agent, and how far the lawmaking power could go in transforming the latter into the former would present a difficult question, for "there is no constitutional way for divesting a man's title except by his own act or default." *Spry Lumber Co. v. Trust Company,* 77 Mich., 199, 43 N. W. 778, 6 L. R. A. 204, 18 Am. St. 306. We, therefore, decline to accept as sound the construction placed upon a statute of apparent similar import to our § 4025, by the Supreme Court of Oregon, that a lessee, obligated by the terms of the lease to build on the land and the building to revert to the lessor, thereby becomes a "contractor" and the statutory agent of the lessor in the construction of such improvements. *Oregon Lum. & Fuel Co. v. Nolan,* 143 Pac., 935. The provisos in § 4029 and this construction of § 4025 harmonize and render the two sections consistent with each other and without which they would seem contradictory. Thus it is provided in the former that the contractor's lien extends only to the contract price, which also limits the lien rights of subcontractors, laborers, material men, etc., unless the owner

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fails or neglects to file the building contract or a memorandum thereof for record, in which event the rights of the latter extend to the value of the services rendered or materials furnished, to the same effect as if the materials were furnished or the work done at the personal instance of the owner; while under § 4029 the owner, with knowledge that his property is being improved without his having contracted in relation thereto, can act affirmatively and avoid liability therefor.

The distinction between the two classes of statutes and the principles involved are clearly recognized and applied in the New York decisions, in which state the different classes of statutes have been in force and their effect considered and determined. In *Cornell v. Barney, supra,* the two classes are considered and the effect of each clearly stated and announced, and our conclusions are in conformity therewith. That case was under a contract statute of that state, being § 1 of Chap. 379, Laws of 1875, while *Burkitt v. Harper,* 79 N. Y. 273, and *Otis v. Dodd,* 90 N. Y. 336, were under statutes of the other class, as was that of *Jones v. Menke,* 168 N. Y. 61, 60 N. E. 1053, relied upon by plaintiffs in error herein. Indeed, in *Schmalz v. Mead,* 125 N. Y., 188, 191, 26 N. E. 251, 252, which was under a permission or knowledge statute, and which involved permanent improvements made by the lessee under a covenant in the lease, it is said: "Under the statute which formerly regulated mechanic's liens in the city of New York, it is no doubt true that parties, situate as the respondents in this case are, could not have acquired any lien, as it was then necessary to show that the labor was performed or the materials furnished by the party claiming a lien under, or by virtue of, some agreement or contract between him and the owner of the land, and hence the numerous cases decided under the statute, as it then stood, have no application to this case."

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The Illinois cases are also under the "consent", "permission" or "knowledge" class of statutes, though the court in *Carey-Lombard Lum. Co. v. Jones,* 187 Ill. 203, 58 N. E., 347, and *Crandall v. Sorg,* 198 Ill. 48, 61, 62, 64 N. E. 769, stated, substantially, that it would regard the law the same if the statute was only of the contract class. The cases, however, did not call for the remark and it is, therefore, of no force and effect. We think, however, that what the court meant was that the facts brought the respective cases within either class of statutes, because the facts and circumstances disclose that the improvements in each case were the joint undertaking of both the lessor and lessee. Moreover, an examination of the cases cited by the Illinois court in support of the statement shows that *Burkitt v. Harper,* 79 N. Y., 273, *Schmalz v. Mead,* 125 N. Y., 188, as we have hereinbefore seen, and *Miller v. Mead,* 127 N. Y., 544, 26 N. E. 251, were based upon either "consent", "permission" or "knowledge" statutes, and the last two named cases were likewise upon contracts of sale, as was *O'Leary v. Roe,* 45 Mo. App. 567, *Hill v. Gill,* 40 Minn., 441, 42 N. W., 294, *Henderson v. Connelly,* 123 Ill., 98, 14 N. E. 1, 5 Am. St., 490, and *McCue v. Whitwell,* 156 Mass., 205, 30 N. E. 1134. The other cases, *Lumber Co. v. Nelson,* 71 Mo. App., 110, *Hall v. Parker,* 94 Pa. St., 109, and *Barclay v. Wainwright,* 86 Pa. St., 191, cited in support of the point are likewise irrelevant thereto, as will hereinafter appear. While there is a diversity of opinion under the contract statutes as to the proof essential to establish the contractual agency, and under the other class of statutes, on the question of what constitutes "consent", "permission" or "knowledge", it would seem that the courts have generally recognized and applied what we believe to be the true rule in such cases, that is, that where the facts and circumstances disclose that the improvement is the joint undertaking of both the lessor and lessee, the interest in the land of both may

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be held under the mechanic's lien law for the improvements so made, but in the absence of such proof only the interest of the lessee is liable. Thus in *Barclay v. Wainwright, supra,* it is pointed out that the presence of an express covenant by the lessee to build at his own expense is not the criterion by which it must be determined whether the lessor's estate can be held for such improvements so made under contract with the lessee, but the determining factor in that regard is the *special character of each contract.* And in *Lumber Company v. Morris, supra,* p. 212, it is said:

"So that in order to make such covenant (to build by the lessee) constitute an agency between the lessor and lessee we are necessarily bound to look at the facts to determine whether there was an agency or not. If on account of the shortness of the lease, the extent, cost and character of the improvements, or other facts in evidence, such as the participation by the lessor in the erection or construction thereof, it can be seen that the improvement is really for the benefit of the lessor and that he is having the work done through his lessee, then it can be said with justice that the lessee in such case is acting for the lessor. But, if the facts do not show this, it would seem to be untenable to say that the mere inclusion in a lease of a covenant to improve and repair on the part of the lessee will create the relation of agency between the tenant and the landlord, especially where the tenant is to do the work at his own expense and is expressly denied any authority to bind the landlord."

Lumber Co. v. Nelson, supra, holds that the fee of the lessor is bound by the lien based upon an improvement made by the lessee pursuant to a covenant in the lease. This case, together with the other Missouri cases and certain Illinois cases, in which very broad language was likewise used, are reviewed and explained in *Lumber Co. v. Morris, supra,* pp. 219-222, as follows:

"Passing to our decision, we find that every one of

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them, which hold that the fee is bound by the lien, do so only after examining the facts to see whether or not the lessee is in fact doing the work for the lessor, or whether the improvement is for the present or immediate benefit of the reversionary or freehold interest.

In the cases of *Dougherty, etc., Co. v. Churchill,* 114 Mo. App. 578, 90 S. W. 405, and *Curtain, etc., Co. v. Churchill,* 126 Mo. App. 462, 104 S. W. 476, the lessee was bound to change a hotel into a theater at an expense of $20,000 and the property became the lessor's at the end of ten years. Besides, the lessor obligated the lessee to build and placed no restriction on his authority to bind with a lien. And the court held that presumptively the lessor made the lessee his agent to bind the whole property for the improvements. But in the case now before us the clause saying the lessee shall have no such authority takes away any such presumption.

In the case of *Winslow Brothers v. McCully,* 169 Mo. 236, 69 S. W. 304, the court bound the freehold interest because the evidence showed that the owner of the fee was really having the work done by the lessee as a mere straw man. On page 248 the court says the lessee was in reality the *alter ego* of the lessor, the Van Raalte Investment Company. And on page 244 the court says the mere fact 'that the tenant has contracted with the owners to make certain improvements on the leased premises, does not make the land or the landlord's interest in the land subject to a mechanic's lien. For in such cases the tenant acts for himself and is not the agent of the owner.' In this case also the court held that it was proper to instruct the jury that if it was the intention, purpose and understanding betwen the fee owner and the lessee that the latter should complete the building for the immediate use, enjoyment and benefit of the lessor, and it was completed in pursuance to that understanding, then plaintiff was entitled to a lien against the fee.

In *Crandall v. Sorg,* 198 Ill. 48, 64 N. E. 769, the

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lessor was jointly interested with the lessee in erecting the improvements which were to cost $300,000 while the price of the lot on which they were erected was a much smaller sum. The court held that the defendant Sorg was not an ordinary lessor but was actively engaged in erecting the building, and did not provide that the lessee should have no authority to bind his interest with a lien, but merely contented himself with a stipulation that if any liens were created the lessee would pay them and hold him harmless.

The case of *Carey Lombard Investment Co. v. Jones,* 187 Ill. 203, 58 N. E. 347, was decided under a statute of that State which authorized a lien against a lessor's freehold if the latter 'authorized or knowingly permitted' the lessee to improve the premises, a statute vastly different from ours. In addition to the statute in that case the court held that by the terms of the lease the right of the lessee to create a lien was recognized and a provision for forfeiture was made in case any were created. Furthermore, the improvements consisted of a building to cost not less than $6000 and the lease was for only five years with privilege of the lessor to terminate sooner and the lessor had in fact terminated the lease and the lessor was insolvent.

We have carefully gone through all of the cases cited by appellant and find that in all of them there is either a statute which by its peculiar terms authorizes a lien against the freehold without reference to the question of agency, or the facts were such as to make the owner of the freehold directly responsible for the improvements.

On the other hand the principle is laid down that a provision in a lease expressly requiring the lessee to make specified improvements or repairs does not make the lessee, in so doing, the agent of the lessor so as to bind the reversion of the lessor with a mechanic's lien therefor. (20 Am. & Eng. Ency. of Law (2 Ed.), 319; *Cornell v. Barney,* 94 N. Y. 394; *Rothe v. Bellingrath,* 71

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Ala. 55; *Morrow v. Merritt,* 16 Utah, 412, 52 Pac. 667. It is true the text says there are decisions to the contrary, but those contrary decisions without exception, in the facts stated, show either a participation by the lessor in the building in addition to the mere covenant in the lease, thus making the lessee actually the agent of the owner to erect the building, or that the case was decided under statutes which so defined the word agent as to bring the persons ordering the improvements within the meaning of that term."

Measuring the facts of this case by the law so ascertained, it is manifest that the judgment of the trial court is right, as the liens claimed may not be sustained under the provisions of § 4025 as affected by § 4027. The lessors neither participated in the erection or construction of the improvement nor approved the plans therefor. They had nothing to say as to the size and architecture of the building or the material of which it should be built. While it was to cost not less than a substantial, designated sum, there is no allegation nor showing that the rents reserved were greater than the reasonable worth of the vacant lots upon which the improvements were to be constructed. If the improvements increased the value of the freehold interest, it was not primarily so but only as a future incident thereto, and the owner of the fee was not the owner of the building or structure within the meaning of the mechanic's lien law. He would become such owner only by operation of law through the expiration or termination of the lease, or at least only when the building was "commenced and completed," when, by the language of the lease, and not until then, it would become a part of the realty of the lessors.

However, should we assume that presumptively the lessors made the lessee their agent by reason of the covenant to build and certain other conditions in the lease, the clause therein expressly denying to the lessee the right and power to charge any lien or incumbrance of

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any kind against the lessors or their estate, nullifies and renders non-effective such presumption. When a lease provides that the lessee shall erect a building on the premises and is silent as to the authority or want of authority of the lessee to subject the lessor's interest to a mechanic's lien, it is only by implication that it can be held that such authority exists. No such implication can arise in this case for the lease expressly denies to the lessee the authority to do anything with the premises that would bind the interest of the lessors therein with a mechanic's lien. The laws of this state do not prohibit or render non-effective a contract so limiting the power of a lessee, and it is unnecessary to inquire into the constitutionality of a law that should attempt to prohibit such contracts when the public health, safety, morals and welfare are in no wise involved. The power to contract with reference to one's property is a valuable right and courts should and will construe statutes as not abridging that right, when possible, in order to preserve the constitutionality of the law. Moreover, as a lease of real property is an instrument which, under the law may be recorded and thereupon constitutes constructive notice to those subsequently acquiring an interest in the premises, the rights and authority of the parties thereto and whatever agency it might be presumed was created thereby to deal with the estate, or the interest of either of such parties therein, is necessarily subject to the conditions and limitations expressed in the instrument creating the agency, unless otherwise provided by law. §§ 694, 707, Rev. Stat. 1908, *Perkins v. Adams,* 16 Colo. App., 96, 100, 63 Pac. 792; *Delta Co. L. & C. Co. v. Talcott,* 17 Colo. App., 316, 321, 68 Pac., 985; *Loser v. Savings Bank,* 149 Iowa, 672, 128 N. W. 1101, 31 L. R. A. (N. S.) 1112.

Thus, in *Cornell v. Barney, supra,* it was held that when the lease was recorded and permanent improvements constructed on the leased premises by the lessee

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under a covenant in the lease obligating him to do so, lien claimants for such work were chargeable with notice of all the terms contained in the lease. And in *Atlas Port. Cement Co. v. Main Line R. Co., supra,* upon the effect of the record of a lease, it is said: "It is true, as argued, that the contract of lease required the building to be erected; but it was to be erected by the lessee and the lessee alone and at its cost. The lease was of record and the appellants must be charged with notice of its contents."

Plaintiffs in error, however, contend that as the clause withholding from, and denying to, the lessee the power to charge the interest of the lessors with any mechanic's lien or incumbrances of any kind, contains a covenant upon the part of the lessee that "it will not permit or suffer any bill of any mechanic, labor or material man to be or remain unpaid," and requires the lessee, before commencing the erection and construction of the building, to furnish a bond satisfactory to the lessors guaranteeing the due observance of the clause, that thereby the contract recognizes that such liens might accrue, be filed, and be binding against the interest of the lessors. We do not concur in this view. On the contrary, we do not think it changes in any manner the meaning of that part of the clause which limits the authority of the lessee in the premises. The lessors were certainly interested in having all bills paid to the end that the lessee's interest in the premises be not subjected to a mechanic's lien and a new tenancy created by operation of law through the enforced assignment of the lease. And this is clearly the purpose of the requirement in that respect.

It is not conceivable that the legislature made provision, as it did by § 4029, *supra,* whereby an owner could protect his interest in land against mechanics' liens for improvements made thereon with his knowledge but in relation to which he had not contracted, and made like provision by § 4025, *supra,* whereby he could, when

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entering into a certain class of contracts, that is, with a contractor or builder, limit to such contract price the lien liability of his land, and intended, as to all other contracts relative to improvements upon land, that an owner's rights in the premises and the liabilities that might be impressed thereon as a lien, could in no wise be protected and limited. Such a legislative enactment, if not unconstitutional, would be, at least, unjust and inequitable. We can not sanction a rule of law, unless by legislative enactment we are so required to do, whereby one man's property may be taken for the debts of another and such person be without power to prevent it. We, therefore, withdraw the former opinion filed herein and affirm the judgment of the trial court.

Judgment affirmed.

Decision *en banc.*

Mr. JUSTICE HILL and Mr. JUSTICE SCOTT dissent.

Chief JUSTICE MUSSER specially concurred:

I agree that the judgment should be affirmed, but I rest my conclusion solely upon clause six of the lease, which is as follows:

"It is expressly understood and agreed (and notice is hereby given), that nothing herein shall authorize the lessee or any person dealing through with or under it to charge said lands, or any interest of the lessors therein, or this lease, with any mechanic's lien, or lien or incumbrance of any kind whatever. On the contrary (and notice is hereby given), the right and power to charge any lien or incumbrance of any kind against the lessors, or their estate, is hereby expressly denied, and the lessee covenants that it will not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid. The lessee shall, before commencing the erection and construction of a building on said premises, furnish

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or cause to be furnished a bond in a bonding company satisfactory to lessors, guaranteeing the due observance of this clause 6."

If a mechanic's lien can be fastened upon the reversionary interest of the lessors it must be that the lease made the lessee the agent of the lessors with authority to so contract with reference to the erection of the contemplated building as to bind the interest of the lessors. The agency, if any, that existed between the lessors and lessees was created by the lease. Plainly that agency did not arise from that part of Sec. 4025 Rev. St. '08, which says that "every contractor, architect, engineer, subcontractor, builder, agent or other person having charge of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act." The lessee was not one of those enumerated in the statute who was to be deemed the agent of the owner for the purposes of the act unless the lease created such agency. If the lessee was at all the agent it was by virtue of the lease and not of the statute. It is elementary that the authority of an agent is limited and controlled by the instrument creating the agency and that any person dealing with an agent, and having knowledge of the limitations upon the latter's authority, must at his peril contract with the agent within the known limits of that authority. When a lease provides that the lessee shall erect a building on the real estate and is silent as to the authority or want of authority of the lessee to bind the lessor's interest with a mechanic's lien, it is only by implication, if at all, that it can be said that such authority exists. No such implication can be made in this case, for clause six of the lease, expressly and plainly, in words that need no other construction than their obvious meaning denotes, withholds from and denies to the lessee the authority to bind the interest of

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the lessors with a mechanic's lien. There is no escape from this. The part of the clause which provides that the lessee would "not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid," is only a personal covenant; that is, one that extends only to the lessors and lessees. Under the lease, a lien would attach to the leasehold interest of the lessee in the premises, and the lessors were interested in seeing that the bills for labor and material were paid. The part of the clause before that withholds from the lessee any and all authority to encumber the lessor's interest with a lien. Nor does the sentence of the clause which provides that the lessee shall furnish a bond guaranteeing the due observance of the provisions of the clause in any manner change the meaning of that part of the clause which limits the authority of the lessee. The lessors were certainly interested in having the provisions of the lease carried out and they had the right to exact a bond guaranteeing such consummation. Any contractor, subcontractor, material man or laborer who would read this clause of the lease could obtain therefrom no other idea than that it was the intention of the contracting parties, the lessors and the lessee, that the interest of the lessors should not be subject to mechanics' liens in consequence of the erection of the building contemplated in the lease.

When the intention of the parties to a contract is found in a contract then it is known what the contract is. What the parties intended by clause six is obvious and plain. If the contract that the interest of the lessors should not be subject to a mechanic's lien is valid then these plaintiffs in error were not entitled to a lien against the interest of the lessors and the judgment of the lower court should be affirmed. In order that it may be said that the plaintiffs in error had a right to mechanics liens on the interest of the lessors it must be held that that part of the lease forbidding such a lien is void and with-

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out effect; and then it must be implied, (for there are no express provisions in the lease to that effect) that the lessee was the agent of the lessors with authority to encumber the interest of the latter with a lien. In order to reach that holding and implication it must be held first, that the mechanics' lien laws of this state prohibit such a contract between the lessor and lessee, and second, that it was within the constitutional authority of the legislature to prohibit such a contract when the public health, safety, morals and welfare were in no way involved. The lien laws of this state do not prohibit or render ineffective such a contract between a lessor and lessee, hence it is not at all necessary to inquire into the constitutionality of a law that should attempt to do so. The power to contract with reference to one's property when such a contract does not affect the public health, safety, morals or welfare, (which matters are under the recognized cognizance of the legislature) is a very important right, and if it can be done, courts will construe statutes as not abridging that right so as to preserve the constitutionality of the law. In Illinois, it has been held that the right to so contract is clearly a property right and if the legislature should pass a statute prohibiting or restraining an owner and contractor from agreeing that the building should be relieved of liens, that such a statute would be unconstitutional.—*Kelly v. Johnson,* 251 Ill. 135, 95 N. E. 168, 36 L. R. A. (N. S.) 573; *Cameron Co. v. Gesike, ib.* 402, 96 N. E. 222.

While I do not express any opinion as to the constitutionality of such a statute, it seems to me that the Illinois cases, and all other authorities are to the effect that the right to contract with reference to one's property is a property right. To say that a person cannot lease his property upon such terms and conditions as he may choose, is to restrain him of full dominion over his property, and certainly any law which so restrains him beyond matters which effect the public health, safety,

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morals or welfare, must do so expressly or by necessary implication, even if it may be constitutional. If such a law is constitutional at all it must come from the legislature and not from the courts. Our Mechanics' Lien Act provides that its provisions shall be liberally construed in order that its purposes may be achieved, but this refers to a liberal construction of what is in the act. It does not mean that the courts, in order that a person may have a mechanic's lien, have authority to drag into the act that which is not there, nor to disregard elementary principles of law, nor by unnecessary implication or doubtful construction lessen that dominion over his property to which an owner is entitled. Sec. 4033 provides that "no agreement to waive, abandon or refrain from enforcing any lien provided for by this act shall be binding except as between the parties to such contract." That section cannot be applied here, for an agreement to waive, abandon or refrain from enforcing a lien must be made by a party entitled to a lien; that is, by a contractor, subcontractor, material man or laborer. There is no such a contract in this case. Sec. 4029 provides that any building, etc., constructed upon any land, with the knowledge of the owner, shall be held to have been erected at the instance and request of such owner, so far as to subject his interest to a lien, unless the owner shall, within five days after he shall have obtained notice of the construction, give notice in a certain manner that his interest shall not be subject to a lien, provided that the provisions of the section shall not apply to any owner who shall have contracted for such erection. Plaintiffs in error contend that because the notice prescribed was not given, the liens attached to the lessors' interest. Assume, for the sake of the argument, that the section would apply in the absence of any notice. That section must contemplate an owner who has not already, in some effectual way, given notice that his interest will not be subject to a lien. Certainly the legislature did not have

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in mind that a person who had already given notice should give additional notice in a certain manner. Nor does the section say expressly, or by necessary or any implication, that a lessor who has already contracted with a lessee, in a manner of which the world must take notice, that the interest of the lessor shall not be subject to a lien, must nevertheless give further notice, as prescribed by the statute, in order that his property shall be free from a lien. Nor can it be reasonably said that the legislature intended that one who already has ample notice from a lessor that the latter's interest shall not be subject to a lien, shall nevertheless be given further notice of that fact in the particular manner prescribed in the section before he can be deprived of a lien. Such additional notice would be needless to one already notified and to say that, because it was not given in the particular manner prescribed in the statute, one who already knows of the fact to be imparted shall nevertheless have a lien, would be somewhat arbitrary to say the least.

Mechanics' lien laws can be sustained only upon the theory that the lien is engrafted upon the interest of the owner because he has consented to the improvement in such a way as to permit a lien. In order that a lien may attach, the circumstances must be such as to show consent of the owner or to justify an inference of it. *Wheaton v. Berg,* 50 Minn. 525, 52 N. W. 926. In order to sustain a lien for the plaintiffs in error in this case, under that section it must be taken that the consent of the lessors is conclusively presumed to have been given in such a manner as would cause their interest in the property to be subject to a lien, because they failed to give the prescribed notice. In the case last cited, the Minnesota court had under consideration a section of the lien laws of that state almost identical with Sec. 4029 of our statutes, and that court struggled manfully to reach the conclusion that the section was constitu-

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tional, and in order to do so it held that the presumption that the owner had consented that a lien might attach to his interest in the premises, by failure to give the required notice was *prima facie* evidence that he had consented rather than conclusive, and that section prescribed a rule of evidence. The court said:

"Those who may be engaged in contributing labor or material which go to the improvement of the land may often have reason to suppose that the work is being carried on at the instance or with the consent of the landowner. It is important to such persons that, if possible, it be made known then if the owner's consent be wanting, and that, therefore, they cannot subject the property to liability for the labor or material supplied by them for its improvement. Hence the statute, in effect, makes it the duty of the owner, who knows of the improvement being made, to give the prescribed notice if he would avoid the inference that it is done with his consent. From the neglect of the duty created by statute the inference follows. But it would seem to be impossible to construe this provision as making the mere neglect to give the specified notice *conclusive* upon the landowner in all cases. The circumstances must be such that he can comply with the statutory requirement, or he cannot be thus concluded."

It can be added with the same degree of force that the circumstances must be such that the persons interested in having a lien attach have not already received notice that the owner's interest shall not be subjected to a lien. The court further said that an owner who has knowledge of the erection of the building upon his premises may nevertheless show that he could not give the required notices and thus excuse his failure for giving them. Equally it can be said under this statute that the owner, in order to relieve his property of a lien may show that he has already given notice to that effect and that all interested did know that he had not consented

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that his interest should be subject to liens, and that, therefore, it would be a needless thing to give the notice specified in the statute. It can not be conclusively presumed that the lessors in this case consented that their interest might be subjected to a lien when they expressly contracted with the lessee that it should not be and gave full notice to the world of such contract before anything was done toward the erection of the building. It is to be observed that Sec. 4029 provides for actual or constructive notice at the option of the owner. It does not expressly or impliedly exclude other actual notice, which may be given, nor does it in any manner assume that other constructive notice provided by general statute or law would not be sufficient.

The Minnesota court, after showing that construing the section as conclusive against the landowner, would make it unconstitutional or of doubtful constitutionality, said:

"But some reasonable effect should be given to the statute if it be possible; and this may be done by construing the statutory presumption, which springs from the failure to give notice, as being of a *prima facie* nature rather than conclusive, and as imposing upon the landowner who, knowing the fact of the improvement, has failed to give the prescribed notice, the burden of relieving himself from the statutory imputation of having consented to what was being done, by proof of his inability to give the prescribed notice of his dissent, and that in fact the improvement was made without his authority or consent. As the statute was obviously intended to establish a *rule of evidence,* and as it cannot be sustained if the statutory presumption is to be construed as conclusive, but may be if it has the qualified effect which we have suggested, we conclude that it must be so construed. The language of the law does not forbid this construction, and there are apparent reasons which may have led the legislature to impose the burden of

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proof on the party who has peculiar knowledge concerning the matters to which evidence is to be directed."

From what has been said, it follows that the section furnishes a rule of evidence, by which, in the first instance, the failure of an owner with knowledge to give the notice therein specified raises the presumption that the owner consented that his property be subjected to a lien, and to overcome this presumption that the owner consented that his property be subject to a lien, he must go forward with evidence to show that he could not reasonably give the notice, or that he had already effectually given actual notice, or such constructive notice as would be given by recording a lease with a provision similar to that in clause six of the present lease.

It is held in some authorities that when contracts of sale or of lease require the vendee or lessee to make improvements that the interest of the vendor or lessor will be subject to a lien when there is no stipulation to the contrary. In *Carey-Lombard Lumber Co. v. Jones,* 187 Ill. 209, 58 N. E. 349, it is said:

"Similar contracts have been before the courts in proceedings to enforce mechanics' liens, and have, without exception, so far as we are advised, been held to amount to authority or consent from the owner to a vendee or lessee to make the improvements, and, *in the absence of some stipulation in the agreement to the contrary,* to give a lien upon the interest of the owner for materials furnished or labor performed under contracts with the vendee or lessee."

This opinion implies that in instances where the agreement contains a stipulation that the interest of the vendor or lessor shall not be subject to a lien such stipulation controls. The cases cited by plaintiffs in error as sustaining their claims to liens were all cases in which there was an absence of such stipulation in the agreement, or as in Illinois, in the case of a so-called lease, the court found that the relation between the par-

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ties was in fact not that of lessor or lessee, but as joint venturers in the construction of a building. In *Shapleigh v. Hull,* 21 Colo. 419, 41 Pac. 1108, the owner agreed to sell land to a named vendee and the vendee agreed to erect houses on two of the lots. The contract was silent as to the right of the vendee to charge the interest of the vendor with a lien, so that there was an entire absence of any stipulation that the interest of the vendor should not be subject to a lien. It was under these circumstances that our court held that a lien would attach to the interest of a vendor. This court has not decided what the law is in the case of the presence of such a stipulation. Since, the decision in *Shapleigh v. Hull, supra,* sec. 4029, was passed. It was said in the Minnesota case, *supra,* that such a statute would permit a vendor who had made a contract similar to the one in *Shapleigh v. Hull, supra,* to free his property from a lien by giving the prescribed notice. If that is true, then the legislature has modified the rule of law as laid down in *Shapleigh v. Hull.*

On the other hand, in *Wilkins v. Abell,* 26 Colo. 462, 58 Pac. 612, there was a mining lease. The court said that by the demise the lessee acquired a qualified interest in the property which entitles him to work the same for his own benefit. In fact it may be said that a mining lease presupposes that the lessee will work the mine, else it would be of no use to him. In that case this court held that, "the lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor in the contemplation of the statute." (Mechanics' Lien Stats.).

In *Antlers Park R. M. Co. v. Cunningham,* 29 Colo. 284, 68 Pac. 226, this court refused to decide whether or not the principle upon which *Shapleigh v. Hull, supra,* was decided would be applicable between a lessor and a lessee.

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In *Williams v. Eldora, etc. Co.* 35 Colo. 127, 83 Pac. 780, there was an option to purchase a mining property and a lease thereof. The lessee was required to perform a certain amount of work on the property. After showing that the possession of the claim of the lessee and the doing of the work under the lease was as lessee and not as vendee in the option this court refused to apply the doctrine announced in *Shapleigh v. Hull, supra,* but applied the doctrine announced in *Wilkins v. Abell, supra,* and said:

"Nor can a lien be asserted as against the lessor owner on the ground that the lessee here occupied some relation to the mine with respect to the working of it other than that of lessee. The contract of leasing did not call for the erection of any permanent improvements. Its only requirement of the lessee in respect to work was that it should begin development work within a certain time and continuously employ two shifts of five men each. In the nature of things, a lease of a mine contemplates that the lessee must do at least ordinary development work. A mine is valuable principally if not wholly on account of the ore it contains, and to extract the same necessarily requires work to be done upon it. The work required here was merely ordinary development work, which brings the case within the holding in *Wilkins v. Abell, supra.* In other words, the labor performed and materials furnished by the claimants for which a lien is sought were done for and furnished to one who was in possession and developing the same whose only relation to the property, so far as concerns any requirement of work thereon, was that of a mere lessee."

In *Colorado Iron Works v. Taylor,* 12 Colo. App. 451, 55 Pac. 942, *Dougherty-Moss Co. v. Churchill,* 114 Mo. App. 578, 90 S. W. 405, and *Jones v. Menke,* 168 N. Y. 61, 60 N. E. 1053, there was no stipulation that the interest of the lessor should not be subject to a lien, and

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hence those cases are not in point here. In the case of *Western Lumber & Mill Co. v. Merchants' Amusement Co.,* 13 Cal. App. 4, 108 Pac. 891, there was a lease, but it did not contain a stipulation forbidding a mechanic's lien on the interest of the lessor. It appeared in that case, and the court found, that the building was really erected by the lessor and that he was using the corporation lessee as an instrument to carry out his own venture. Certainly an owner cannot thus free his property from mechanics' liens. And it was for that reason that the California Court held that the lien would attach. In *Crandall v. Sorg,* 198 Ill. 48, 64 N. E. 769, there was a contract wherein it was agreed that Hullinger would sell and convey the land to Sorg; that the latter would then execute a lease for ninety-nine years to the former and that a building should be erected on the premises. Later on the lease was executed, and provided also for the erection of a building, and had in it a provision that no mechanics' liens should affect the claims of the lessor in the building and his rights in the premises. The court held that the contract and lease were executed as part of the same transaction; that they constituted one writing and should be construed together, and that when so read together it was manifest that Sorg was "not to be regarded as but an ordinary lessor of the premises." But on the contrary, it was held that the instruments disclosed that Sorg and Hullinger "jointly engaged in an enterprise which had for its purpose the construction of a building for rental purposes on the premises in question." Each put up money for that purpose. Under these circumstances, it was held that the clause in the lease concerning mechanics' liens was of no avail because Sorg was in the position of an owner engaged in erecting a building and not as a lessor.

In *Provost v. Shirk,* 223 Ill. 468, 79 N. E. 178, there was a contract of sale and lease the same as in the former case, so that the socalled lessor and lessee were jointly

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engaged in the enterprise and were in the position of owners of the property. These Illinois cases placed the lessors and lessees in the position of two tenants in common, who contract with each other concerning the erection of a building upon their joint premises. In such a case, of course, they could not contract with one another so as to free the property of either from mechanics' liens. The question of abridging the right to make a contract concerning one's property with a lessee or vendee, which would be otherwise lawful, is not involved in any of the cases cited, and has never been passed upon by this court. That question is the one that is now presented. It appears to me that a reasonable view of our mechanics' lien laws is that they do not, expressly or by any implication, say that such a contract made between a *bona fide* vendor and vendee, or a *bona fide* lessor and lessee, would have no effect, when due notice has been given thereof. The contract between the lessee and the principal contractors expressly mentioned the lease and it was known that no contract was entered into with the owners of the fee. Owners of property have rights which courts and the legislature must respect. If a contractor has notice that he is to erect a building for a lessee it is reasonable that he should be required to ascertain the contents of the lease if he desires to proceed on the credit of the interest of the lessor. Had the subcontractors and material men investigated the nature of the principal contract they would have known of the lease, could have ascertained all of its provisions, and thus learned that they could not contract or sell on the credit of the lessor's interest. To have done so would have been the exercise of ordinary business diligence. There is nothing in our statutes, that I can find, that permits contractors and others who may have lien claims to proceed without any diligence to ascertain facts that are easily before them. Ordinary diligence

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may be required of owners who construct or permit to be constructed improvements upon their property which become not only a source of profit to them, but of benefit to an entire community, but ordinary diligence should also be required from those who perform upon the credit of the property. To free lien claimants from ordinary and reasonable diligence is to place an embargo upon improvement and progress. The lease in this case was recorded the day after its execution, and before any right to a lien could have attached. A lease of real property is such an instrument as is entitled to record under sec. 694 Rev. St., and, therefore, its recordation is constructive notice to the world of its contents. While that section does not specifically use the word "lease" it does use the words "agreements in writing of, or effecting title to real estate or any interest therein," and a written lease of land is such an agreement. Besides, sec. 707 says that the term "deed" includes leases, and the term "deed" is used in sec. 694. An instrument that is recorded according to law, and which the statute says shall be notice when recorded, is notice to the world of all the facts and matters therein expressed, and not only of such facts, but of all facts suggested therein and which reasonable inquiry would elicit.—*Perkins v. Adams,* 16 Colo. App. 96, 163 Pac. 792; *Delta etc. Co. v. Talcott,* 17 Colo. App. 316, 68 Pac. 985; *Loser v. Savings Bank,* 149 Ia. 672, 128 N. W. 1101, 31 L. R. A. (N. S.) 1112.

In *Armstrong Cork Co. v. Merchants' Ref. Co.,* 184 Fed. 199, 107 C. C. A. 93, there was a lease which provided that the improvements made by the lessee should remain his property, and the court held that the recording of the lease was notice of this stipulation. The court said:

"The record of the lease was notice to the complainant that the improvements he was placing in this warehouse remained the personal property of the lessee,

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that they did not become a part of the realty and that Lyon's reversion in the warehouse and the land upon which it stood were not chargeable with a mechanic's lien for the purchase price of the work and the material it was furnishing *Faxon v. Ridge,* 87 Mo. App. 299, 307, and the conclusion is that the amended bill did not state facts sufficient to show that the complainant was entitled to a lien upon the interest of the lessor in the land and warehouse."

In *Cornell v. Barney,* 26 Hun. 134, there was a lease from the owner in which the lessee agreed to build or cause to be built on the land a building. The lease was recorded. Suit was commenced to foreclose a mechanic's lien against the interest of the lessor, and it was held that when the lease was recorded, the lien claimants were chargeable with notice of all the terms contained in the lease. In *Atlas P. Cement Co. v. Main Line Co.,* 112 Va. 7, 70 S. E. 536, while it was held that under the Virginia statute the right to a lien would not be implied where a lessee provided that the lessor should erect a building, yet on the question of the effect of the record of the lease the court said:

"It is true, as argued, that the contract of lease required the building to be erected; but it was to be erected by the lessee, and the lessee alone, and at its cost. The lease was of record and the appellants must be charged with notice of its contents."

Undoubtedly the record of the lease was notice to the world that the interest of the lessor was not subject to a mechanic's lien unless it is held that the mechanics' lien statute repealed *pro tanto* the recording statute. Repeals by implication are not favored.—*Haldeman v. Colorado City,* 52 Colo. 234, 120 Pac. 1041.

In *Dunton v. The People,* 36 Colo. 128, 87 Pac. 540, it is said:

"If the provisions of the two statutes can be so con-

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strued as to stand together, that construction must be given them, and the former is not repealed because they are consistent, and the repealing clause only purports to repeal the inconsistent parts of the act."

In Black on Interpretation of Laws, p. 112, it is said:

"Every new statute should be construed in connection with those already existing in relation to the same subject-matter, and all should be made to harmonize and stand together, if that can be done by any fair and reasonable interpretation, and if the new act does not expressly declare the repeal of an earlier statute, it will not be construed as effecting such repeal unless there is such a repugnancy or conflict between the provisions of the two acts as to show that they could not have been designed to remain equally in force."

The provision in the mechanics' lien laws, that an owner may, in a certain way, give notice that his interest is not to be subjected to a lien, is not at all inconsistent with the recording statute, under whose provisions the same notice may be given in another way. The two statutes can and should be read together and both permitted to stand.

In *Boyer v. Keller,* 258 Ill. 106, 101 N. E. 237, there was a lease which provided that the premises were to be used only as a theater, and that the lessee would make no alteration to the building on the premises without the written consent of the lessor. The privilege to make alterations was given to the lessee and he was to pay for all made. The lessee made alterations which were permanent in character and increased the value of the premises. The question was presented whether sec. 1 of the Illinois Act, so far as it subjected to a lien the property of one who knowingly permitted another to contract for improvements thereon, violated the constitution of the state. The court said the section did not restrict

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the right of the owner to freely contract with reference to improvements which should be made upon it. It said that the lessor had the undoubted right to contract with the lessee that any improvements made should be made at the cost and expense of the latter and that the section did not prevent the enforcement of that contract. The court said:

"So long, however, as that contract remained a secret agreement between the lessors and the lessee, said section 1 made the lessor owners liable in case they authorized or knowingly permitted the lessee to contract for the improvement of the property without advising the contractors or material-men of the provisions of the lease and notifying them that they must deal with the lessee under its terms."

And it was found that none of the lien claimants knew anything about the provisions of the lease. There was no claim that the lease was recorded. This case simply holds that the provision in a lease against liens that is kept secret and no notice of which is given will not save the interest of a lessor from the lien.

In *Pac. S. & D. Co. v. Bumiller,* 162 Cala. 664, 124 Pac. 230, 41 L. R. A. (N. S.) 296, the lease between the owners and the lessee provided that the owners should not be liable or responsible for any alteration or repair made in the building, by the lessee and that no alteration should be made without the written consent of the owners. It does not appear that any notice whatever was given of the lease and its provisions, by record or otherwise, and that case was determined as though no such notice had been given.

In *Hardware Co. v. Churchill,* 126 Mo. App. 462, 104 S. W. 476, there was a lease which provided that the lessee should have the right to make alterations in the leased premises and that all improvements made to him should be at his own expense and on his own account.

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The lease was recorded shortly after it was executed. The court held in that case that the recording of the lease gave the lien claimant constructive notice of its terms, but held that the lien would attach, notwithstanding the agreement that the lessee should do the work at his own cost. This case comes more nearly in point in favor of the claimants than any they have cited. It is to be noticed, however, that the agreement in the lease was not that no right of lien should attach to the interest of the lessor, but that the lessor should construct the improvement at his own expense and on his own account. What is said in *Lumber Co. v. Morris,* 170 Mo. App. 212, 156 S. W. 75, at the top of page 220, kills the decision in the 126 Mo. App. as an authority in this case.

Rehearing granted defendants in error, January 4, A. D. 1915. Decided November 3rd, A. D. 1913. Rehearing denied to plaintiff in error, March 1, A. D. 1915.

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CONSTITUTIONAL LAW.

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Municipal Corporations Contributing to Private Enterprise.—On May 20th, A. D. 1913, the City and County of Denver adopted an amendment to their charter (§ 355), providing for the creation of a Tunnel Commission, with authority to construct or assist in the construction of a tunnel through the main range of the Rocky Mountains for the transportation of freight, passengers, water, and electricity, and with power to enter into contracts with individuals or corporations for the

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construction, control and management of the tunnel, and for the future lease, sale or disposition thereof; providing for the issue of bonds by the municipality in $3,000,000 to assist in the expense, and for the annual levy of a tax sufficient for the creation of a sinking fund to discharge such bonds at maturity. Later the Tunnel Commission entered into a contract with a railway company for the construction and equipment of a tunnel, and its approaches, for railway transportation purposes, at the estimated cost of $4,500,000, and ready for the installation by the city of facilities for the transportation through the tunnel of water and electricity; the actual cost of the construction of the tunnel to be paid in the proportion of one-third by the railway company, and two-thirds by the city; the railway company paying the annual interest on the bonds of the city, and the entire cost of maintenance, equipment and operation of the tunnel; that other railway companies might use the tunnel and its approaches upon certain terms set down in the contract; and finally for the sale of the tunnel by the city to the railway company, reserving the perpetual right to its use, for the transportation of water and electricity only.

Among other stipulations was a provision conferring upon the city the exclusive right, in perpetuity, to construct and operate, through the tunnel, an acqueduct or pipe-line etc., for conveying water for use by the City and its inhabitants, from the western to the eastern portal thereof, and the right to extend through the tunnel, cables, wires, and other apparatus, for conveying electricity to be used by the city for power, light and other purposes.

On bill brought by a taxpayer, the amendment of the charter, and the contract pursuant thereto, were held clearly in violation of §§ 1 and 2 of Art. XI of the Constitution, (1) in pledging the credit of the city in aid of a private corporation; (2) in creating a partnership between the city and the railway company; that the reservations in favor of the city had not the effect to change the character of the proposed enterprise in this respect, or relieve it of its infirmities; (3) that the reservation to the city of the right to operate an acqueduct or pipe-line for conveying water from the western to the eastern portal of the tunnel was a mere easement, which the city had no means or right to enjoy, having no water or right to water to be so conveyed; (4) that the reservation of the right to bring electricity was without value, since the electrical current might be obtained elsewhere for a comparatively insignificant sum; (5) that the reservation of the city of the title to all mineral veins discovered was unlawful, in that the city has no power to tax its inhabitants to promote a prospecting contract; that what the reservation contemplated is not within municipal powers; (6) that the reservation to other companies of the right to enjoy the tunnel is within the constitutional prohibition, in that the city has no more power to extend its credit in aid of two or more railroads than one; and because

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further, the contract provides that the railroad company with which the contract was made should be entitled to exact from every other railway company, desiring to use the tunnel a yearly charge during the fifty years of the life of the contract for its own use, as a condition precedent.

Held further, that the contract was invalidated by the provision for the sale of the tunnel by the city to the railway company; that it is not within the ordinary powers of a municipal corporation to construct an improvement, convenience, or necessity, with the avowed purpose to dispose of the same, or an interest therein, to a private person or corporation. *Denver v. Hallett*, 34 Colo. 393, distinguished. —*Lord v. Denver*, 1.

Will of the People. Where a municipal corporation is proposing to enter into a contract prohibited by the Constitution, the fact that both the legal voters, and the tax payers of the community, have expressed themselves in unmistakable terms, in favor of the project, is of no moment.

And the express declaration in the charter amendment, that the project proposed "will be of local use and convenience to the public, and is essential to the future growth of the city" is equally to be disregarded.—*Lord v. Denver*, 1.

Article XX—§ 1, contains no repeal of the limitation upon the powers of the municipal corporations prescribed by §§ 1 and 2 of Art. XI.—*Lord v. Denver*, 1.

CONTRACTS.

Validity. Nothing in our statutes prohibits or renders non-effective, a contract forbidding a lessee to encumber the estate of the landlord by the creation of liens for improvements, constructed by the lessee.—*Stewart v. Talbot*, 588, 602.

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Consideration. Any damage, suspension of right, or possibility of loss to the one to whom a promise is made is a sufficient consideration to support such promise.—*Grimes v. Barndollar*, 437.

Plaintiffs being indebted to defendants in $10,759 executed a note therefor due in three years, with interest, and conveyed to defendants, as security therefor, certain lands, situate in Kansas. A contemporaneous contract provided that plaintiffs should retain possession of the lands for three years, might sell the same, paying over anything received thereon to defendants, and if they should fail to sell the lands, or should not pay the note at maturity, the title of the lands "should be and remain" in defendants, and plaintiffs should be cred-

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ited on their note with the sum of $11,200. Plaintiffs having failed to pay the note demanded the credit of $11,200, tendering what they alleged to be the balance. *Held* that the demand, and compliance therewith, would be a consideration sufficient to vest title in defendants, and bar the equity of redemption; and that there was no lack of mutuality in what was proposed.—*Gibbs v. Wallace*, 364.

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Agreement to pay a certain encumbrance upon lands "with interest," construed to import interest from the date of the agreement. —*Gibbs v. Wallace*, 373.

Plaintiff, an architect, was employed by a corporation to prepare plans and specifications for remodeling a building, in order to convert the same into a theatre. A contract in writing was entered into, fixing the architect's duties and compensation. It was afterwards discovered that the proposed transformation was impracticable. New parties became interested in the enterprise, and a new corporation was organized. The building was torn down and a new one erected. The architect was continued in charge of the work until its completion, with the understanding that he was acting under the original employment. *Held* that the original contract establishing the architect's compensation was properly received for that purpose.—*Princess Co. v. Edbrooke Co.*, 207.

Agreement for the sale of five acres of land. The agreed price, and the reasonable value was $2500.00. During the negotiation question arose whether about one-tenth of the tract was above the lateral by which the land was irrigated, and the vendor agreed, if this should prove to be the case, to provide means by which water could be made to cover this elevated part. *Held* this provision imported that the vendor should either raise the lateral, or grade down the elevation; and it appearing that the change in either manner would not have exceeded in cost about $75.00, *held* further that the provision was not an essential part of the agreement, a condition precedent, nor a dependent covenant, but a minor detail, for default in which the vendee might be compensated in damages; and that he was not entitled to rescind for the vendor's failure to perform it.—*Cheney v. Bierkamp*, 319.

Contract for the sale of a stallion, with a warranty, followed by

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the words "or it will replace said horse with another of equal value." The liability of the seller is not limited by this alternative. If the animal was not as warranted the seller is liable in money damages.—*Denver Co. v. Schafer*, 376.

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Plaintiff was one of a group of men employed in repairing the track of a railway, and while so employed was run down and seriously injured by defendant's train. He testified that he was not aware of the approach of the train; that no signal was given; that he knew that trains were likely to pass, and that it was his rule to look for an approaching train at intervals of from one to ten minutes. Some of the party were still at work upon the tracks, at the time of the injury, and next previous thereto. The train came from the north and was moving slowly with little noise; plaintiff was facing to the south. The work in which he was employed occasioned some noise, and a train upon another track nearby was passing at speed. *Held* that the question of contributory negligence should have been left to the jury.—*Sagara v. Chicago &c. Co.*, 236.

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which is permitted by law, is notice, not only of its contents, but of all facts suggested thereby, which reasonable inquiry would elicit.—*Stewart v. Talbot*, 603.

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The provision of the statute prohibiting the encumbrance of the plant does not concern the public at large. No principle of public policy is involved; no wrong is done to any human being by an encumbrance made without the consent of the stockholders, save to the stockholders themselves; as others are not concerned they have no right to avail themselves of the irregularity.—*Id.*

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Homicide—Implied Malice—For the Jury. In the trial of an information for murder the jury should not be instructed that where no considerable provocation appears or the circumstances show an abandoned and malignant heart the law implies malice, and it is not necessary that they should determine the question. The court should direct the attention of the jury to the statute (Rev. Stat. Sec. 1624), and they should be left to draw the inference of malice.—*Jabich v. The People*, 175.

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Malice, is not a necessary element in a statutory offense, unless expressly made so, where there was no such offense at common law. —*McCausland v. People*, 303.

Information, charging that the accused did "unnecessarily and cruelly beat and needlessly mutilate" an animal, is sufficient.—*McCausland v. People*, 303.

Evidence—Circumstantial Evidence, to warrant a conviction, must not only be consistent with the guilt of the prisoner, beyond reasonable doubt, but must be inconsistent with any reasonable hypothesis of his innocence.—*Beeler v. People*, 451.

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Where, upon the trial of an information for murder the defense is that the accused was lawfully defending himself against an assault, and during the encounter the deceased was accidentally killed, the court should instruct upon the law of self-defense in connection with the law defining death by misadventure, because the question

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CRIMINAL LAW—Cont.
whether the accused was lawfully exercising the right of self-defense is involved in the defense of homicide by accident. *Nilan v. People*, 27 Colo. 206, explained.—*Jabich v. People*, 175.

Indictment for Larceny. The evidence was circumstantial, and the court charged that the circumstances relied upon by the prosecution, should, to warrant a conviction, be made out beyond a reasonable doubt, and be "substantially inconsistent" with the prisoner's innocence; "practically incompatible with any reasonable hypothesis of his innocence;" "clearly and substantially made out," beyond reasonable doubt. The phrases quoted were condemned as a departure from the phraseology established and approved in like cases, but the evidence of guilt being overwhelming, *held* that they were not prejudicial.—*Beeler v. People*, 451.

Change of Venue. Information for wilful murder. More than 90 percent of the population of the county subject to jury duty resided in, and in the vicinity of, the mining town in which the homicide was committed. There was a strong prejudice in that community against men of the nativity of the accused. Immediately after the homicide a mob pursued the accused, threatening to lynch him, and the sheriff had thought it necessary to remove him to another county for safe keeping. Newspapers had published untruthful and inflammatory accounts, highly prejudicial to the accused. *Held* that a change of the venue should, in the exercise of a sound discretion, have been allowed.—*Jabich v. The People*, 175.

Renewal of Motion, after Conviction Reversed, must be upon a new showing, of the conditions then existing.—*Id.*

Practice. The withdrawal from the jury of one count of an information is harmless.—*Tashima v. People*, 98.

CUSTOM.

Unlawful. A custom established in a particular water district, that water shall be employed for direct irrigation only during a particular season of the year is contrary to statute and binds neither the water officials nor consumers from the same stream in other districts.—*Comstock v. Larimer and Weld Co.*, 186.

DAMAGES.

Pleading as to. Action for the breach of the warranty of a stallion. Damages claimed for his keep, must be pleaded, as to the items and amounts with reasonable particularity.—*Denver Co. v. Schafer*, 389.

Evidence as to. Action against a surgeon for negligence in reducing a fracture, by reason of which negligence a second fracture, and a second reduction, became necessary. The evidence held sufficient to warrant a verdict for one thousand dollars, and that such

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DAMAGES—Cont.
award was no evidence of passion or prejudice on the part of the jury.—*Craghead v. McCullough*, 485.

Measure—Trespass to Metalliferous Mines. In the case of an innocent trespass, and the subtraction of ore from a metalliferous mine, the measure of damages is the gross value of the ore before disturbance; not the net product or gross proceeds. Where the trespass is wilfull, and the wrong-doer has milled the ore, or sold it, the plaintiff recovers the gross proceeds realized, without any deduction for the increased value which the trespasser has created by his efforts.—*Liberty Bell Co. v. Moorhead Co.*, 308.

The Measure of Damages, in an action for the breach of a warranty of chattels is the difference between the market value of the chattel, at the time and place of the sale and delivery, if it had corresponded with the warranty (even though in excess of the agreed price), and its actual value with its then existing defects, together with any special damages necessarily resulting from the breach of the warranty.—*Denver Co. v. Schafer*, 376.

The purchaser is to be allowed the expense of the keep of the animal, only up to the time when the breach of the warranty became definitely known.—*Id.*

Interest is not to be allowed upon the damages.—*Id.*

The purchaser having retained the animal, the seller is entitled to an allowance for his value, for other purposes than that for which he was purchased.—*Id.*

Loss of Profits. The loss of profits during the breeding season is too speculative and remote.—*Id.*, 389.

Conversion of Corporate Stock—Of what Date to be Valued. Administrators had demanded corporate stock from one who was entitled thereto by gift of their intestate. She delivered them under protest, and the administrators received the same in their representative capacity and disposed of a portion thereof, applying the proceeds to the purposes of the estate. *Held* that the stock should be valued as of the date of the administrators refusal to surrender them on plaintiff's demand, with an addition for any dividends paid thereon, after the date of a certain agreement by which plaintiff's right to the stock was conceded by the heirs, and the date of her demand therefor, with interest upon the entire amount from the date of the demand.—*Grimes v. Barndollar*, 421.

Several Plaintiffs— Part only Prevailing. In an action upon a contract, by several plaintiffs, as to only a part of whom the action is sustained, the recovery is the same as if all were entitled.—*Denver Co. v. Schafer*, 376.

DECEIT. See *FRAUD.*

DIVORCE.

Condonation—Plea of, may be pleaded with the general denial.—*O'Rourke v. O'Rourke*, 300.

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EJECTMENT.

Title. The legal title prevails where no issue of equitable cognizance is tendered.—*Ohio and Colorado Co. v. Barr*, 116.

ELECTION OF REMEDIES.

Vendor and Vendee—Non performance by Vendor—Remedies of Vendee. Where the vendor fails to perform a substantial covenant on his part the vendee may rescind and recover damages, or may affirm the contract and sue for the damages occasioned by the vendor's failure to perform.

These remedies are inconsistent, and where the vendee has made his election he must stand or fall by the position so first assumed.—*Cheney v. Bierkamp*, 319.

ELECTIONS.

Political Party—Statute Construed. In common use the phrase "political party" is synonomous with political organization; but the legislature by c. 4 of the laws of 1910 make a marked distinction between them. An association of electors, who, by petition, place upon the official ballot, individual nominees for public office are a "political organization," even though this is not their intention. To become a political party it must participate in the election, and its candidate for governor must receive at least 10 per cent of the total vote cast at such election.

A political party cannot nominate by petition, nor can a political organization, so nominating, adopt any portion of the name of a political party then existing.—*Election Commission v. People ex rel.*, 105.

A political organization is, under the statute, a distinct entity which can neither coalesce with another, nor lose its identity therein by the mere fact that its candidate, principles, and management are the same.—*Id.*

How the Percent of the Vote is to be Ascertained. Distinct political organizations, under different names, presented the same gentleman as their candidate for governor. One of these was denominated the Progressive Party. On application to the Election Commission of Denver by those claiming this title, to accept and use in the appointment of judges as registrars, at the next succeeding election, certain electors nominated by them; *held* that the votes cast by all these several organizations for the same candidate, were not to be considered as cast by the Progressive Party. The right of the relator it was said is not conditioned upon the number of votes which its candidate received, but upon the number which his organization cast. —*Id.*, 105.

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ELECTIONS—Cont.

And evidence that the several different organizations, so voting for the same person, were but one organization, under different names, was held inadmissible.—*Id.*

EMINENT DOMAIN.

Value of Land Taken, is to be estimated, not merely with reference to the use to which it is at the time applied, but with reference to all uses to which it is plainly adapted. The owner is entitled to the market value thereof, considered with reference to all useful purposes, to which in its then condition, it can be devoted.—*Scurvin Co. v. Roberts*, 533.

EQUITY.

Jurisdiction. It seems that where lands are conveyed to one as trustee, the conveyance not defining the trust, or naming the beneficiary, a court of equity may by its decree supply the defects of the conveyance.—*Ohio &c. Co. v. Barr*, 116.

Laches. Lands were held by title absolute, but in fact as security for money. Possession was delivered to the mortgagee, and for many years he received the rents and profits, not as his own, but for the mortgagor. The mortgage debt was never denied. *Held* that the mere lapse of time, the relations continuing, and being admitted, affected the rights of neither party.—*Hawkins v. Elston*, 400.

Rescission of Contract. One who would rescind a contract must do so within a reasonable time. Delays induced by the promises of the other party, or his acts and declarations, may be excused.—*Lathrop v. Maddux*, 258.

ESTOPPEL.

By Conduct. An action asserting title to the entire estate of a deceased person does not estop the plaintiff from afterwards asserting a just claim to a portion thereof.—*Grimes v. Barndollar*, 421.

One who having title to lands, causes the same to be sold on execution as the property of another, who claims an interest therein, and becomes the purchaser at the sale is not, merely by such conduct, not having made any representation or done any act to influence other creditors, estopped to assert his title as against another judgment creditor, who redeems from such sale, causes the lands to be sold on his execution, pursuant to such redemption, and procures the conveyance of the sheriff; and this even though he receives and retains the redemption money.—*Ohio &c. Co. v. Barr*, 116.

Ratification. Bowlds bought the whole issue of stock of a bank and assumed control of its business. He pledged certain shares to another bank to secure a loan. Subsequently, having no funds at all

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ESTOPPEL—Cont.

in the bank and being indebted to plaintiff, he drew a draft in the name of the bank for a portion of the debt, and a certificate of deposit for the residue. No other officer of the bank knew of the transaction. Plaintiff collected the draft, and shortly thereafter the bank failed, and its affairs passed into the hands of a receiver, the loan from the other bank remaining unpaid. *Held* that the failure of the bank, while so under the control of Bowlds, to repudiate the transaction, raised no estoppel either upon the bank or the receiver. Judgment in favor of the receiver for the amount of the draft, and disallowing the certificate of deposit as a claim against him. Affirmed. —*DeBaca v. Higgins*, 75.

Where it is sought to raise an estoppel by reason of representations influencing the conduct of the one asserting the estoppel, the misrepresentation must be plain, not matter of influence or opinion.—*Ohio and Colorado Co. v. Barr*, 135.,

EVIDENCE.

Judicial Notice, taken that the electric current may be as easily conveyed over a mountain as through a tunnel.—*Lord v. Denver*, 21

Of the difference in rates charged by telephone companies, between business establishments and residences.—*Wolverton v. Mountain Co.*, 62.

That at the enactment of our revenue law, many corporations, both foreign and domestic, held all their properties in the state and there were many domestic corporations with practically no property within the state, and others of each class holding property, both within and without the state.—*Denver v. Hobbs Estate*, 229.

That express companies, sleeping car companies, fast freight companies, etc., own the cars which they operate by agreement over the tracks of railway companies.—*Booth v. Central Bank*, 533.

That the duties of a switchman, employed in the yard of a railway company require him to be at times, upon the tracks, even though he is there exposed to great danger of injury.—*Kett v. Colorado and Southern Co.*, 392.

Presumptions. Presumed that injury attends the violation of a private right.—*Greeley &c. Co. v. Farmers Pawnee Co.*, 462.

A status once shown to exist is presumed to continue, until the contrary is shown.—*Election Commission v. The People*, 110.

Where the same person is the candidate of several distinct political organizations, at an election, no presumption is indulged as to the number of votes cast for him by either of such organizations.—*Election Commission v. The People*, 110.

The price at which a chattel is sold is presumed to be the real value where there is no other evidence upon the question.—*Denver Co. v. Schafer*, 376.

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EVIDENCE—Cont.

Burden of Proof. One who defends an action for a tort upon the ground that no injury resulted to his adversary has the burden of proof.—*Greeley &c. Co. v. Farmer's Pawnee Co.*, 462.

Competency. Replevin for a warehouse and certain machines and machinery. The plaintiffs claimed under a sale of certain properties of a bankrupt corporation, made pursuant to an order of the referee in bankruptcy. The order recited that the stockholders had prayed that the real estate should not be sold, "which request was granted." *Held* the fact that the corporation carried the warehouse on its books as real estate, was competent to show what the stockholders had in mind in petitioning for the exclusion of the real property from the order of sale.—*Union Trading Co. v. Drach*, 550.

Mandamus to compel the Election Commission of Denver to accept as eligible to appointment as judges and registrars of election, certain persons nominated by a committee of what was called "The Progressive Party." *Held* that votes cast at a previous election by other organizations, for the candidate of the Progressive Party, were not to be counted as cast by that party.—*Election Commission v. People*, 105.

And in the same case evidence that several different organizations, were one and the same, under different names was held inadmissible.—*Id.*

Relevancy. Action against McDougall and Keely as partners to recover an installment of the purchase money of a smelter site and the dump thereon, the legal title to which was vested in Keely. Keely denied the partnership. The complaint and proceedings had in an action instituted by Keely to restrain interference with the operation of the dump received to affect the testimony of Keely that he was not interested in the property, and held competent for this purpose.—*Richardson v. Keely*, 47.

Evidence relevant to any phase of the issues, is admissible.—*Grimes v. Barndollar*, 421.

Replevin for a warehouse, plaintiff claiming under a sale of the properties of a bankrupt corporation, made pursuant to the order of the referee in bankruptcy. The only words of description in the order which could be construed to include the property in question were "fixtures and equipment." The referee in bankruptcy, previous to the sale, caused an appraisement to be made of the warehouse and equipment, and other items, of much less value. Subsequent to the sale the referee ordered a second appraisement of the identical properties in controversy. These circumstances were accepted as tending to prove the absence of intention on the part of the referee, or the court in bankruptcy, to include in the sale the warehouse and equipment.

That subsequent to the sale the purchaser negotiated with the trustee in bankruptcy for the rental of the warehouse, stating what,

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EVIDENCE—Cont.

in his opinion, would be a fair rental, and making no claim that it was included in the purchase, was accepted as negativing the claim of plaintiffs.—*Union Trading Co. v. Drach*, 550.

Opinions. The opinion of a single witness, not supported by any reason, that a particular stone found by him, many years before controversy arose, was a section corner, rejected.—*Biddle v. Newman*, 243.

Parol Admissible, in an equity suit to establish and define the trust, and identify the beneficiary, in a conveyance of lands to one named as trustee merely.—*Ohio &c. Co. v. Barr*, 116.

Parol Inadmissible. All prior negotiations merge in the writing finally executed to evidence the agreement of the parties.—*Denver Co. v. Schafer*, 376.

Measure of Proof Required. Whoever asserts that a conveyance of lands, absolute in terms, is in fact a mortgage, must produce clear and convincing evidence that this was the intention.—*Hawkins v. Elston*, 400.

One seeking the reformation of a writing has, not only the burden of proof, but must produce evidence sufficient to rebut the strong presumption created by the writing itself.—*Gibbs v. Wallace*, 364.

EXECUTION.

What Interest in Lands Liable. Any interest in lands, legal or equitable, may be sold upon execution (Rev. Stat. sec. 3609).—*Ohio Co. v. Barr*, 116.

No rule of law or morals prevents the creditor from levying his execution upon any lands in which he even suspects the debtor to have an interest, and proceeding to the sale thereof.—*Id.*

The creditor may levy upon and sell lands where another claims an interest, in which he himself already has an interest, or even the whole title.—*Id.*

Effect of Levy as to Creditor Redeeming. The levy of an execution upon lands is not a warranty nor even a declaration that the defendant in execution has title to the lands or any interest therein.—*Ohio &c. Co. v. Barr*, 116.

What the Purchaser Acquires—Duty of Purchaser. One contemplating the purchase of lands upon execution sale is under duty to make diligent inquiry as to the title of the execution defendant.—*Ohio &c. Co. v. Barr*, 116.

The maxim *caveat emptor* applies; the purchaser takes whatever interest in the lands the debtor has, and only that interest.—*Id.*

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EXEMPTIONS. See *HOMESTEAD EXEMPTIONS.*

EXECUTORS AND ADMINISTRATORS.

Liability. Corporate stocks were delivered, under protest, to administrators, by one in possession of, and claiming them by gift of the decedent, and were by them inventoried, and a portion thereof afterwards sold under order of the County Court. The administrators acted throughout in good faith, under the advice of the County Judge, and with the knowledge of plaintiff. They made no personal gain in the transaction. *Held* they were not personally liable for the value.—*Grimes v. Barndollar*, 421.

Power of the Court to Refuse Letters Testamentary. The law is a jealous guardian of the estates of deceased persons, and when the appointment of the executor named in the will of the decedent may endanger the estate, or lead to embarassment in the administration, it is within the power of the court, and is its clear duty, to commit administration to another, e. g. where the executrix is bitterly hostile to the insane widow, and the estate is hardly of sufficient value to discharge the widow's allowance, and pay the debts of the deceased the appointment, as administrator, of the conservator of the insane widow, a man of high character, and a long-time friend of the parties, approved, as warranted by Rev. Stat. 7111.—*Deeble v. Alerton*, 166.

Distribution—Stay of. One claiming a share in the estate of a decedent, who is *prima facie* entitled thereto, and is diligently prosecuting her claim in the courts, is entitled to apply in the court of administration to stay a distribution which will so reduce the estate as to impair her right, until those to whom distribution is directed shall give bond for re-payment of the amounts distributed whenever she shall have established her right.—*Oles v. Macky's Estate*, 295.

To deny the application is a gross abuse of discretion.—*Id.*

Special Execution Against. Action commenced and an attachment levied in the lifetime of defendant. The attached property was sold, pursuant to stipulation of the parties, and the money paid into court to await the result of the action. The defendant died during the pendency of the action, and the administrator being substituted, judgment was given against him. *Held* that nothwithstanding the provisions of Rev. Stat. sec. 7209 it was proper to award a special execution, directing the sheriff to take and apply the proceeds of the attached property to the satisfaction of the judgment.—*Catlin v. Vandegrift*, 289.

Widows Allowance. See *HUSBAND AND WIFE.*

FIXTURES.

No Universal Test Of. There is no universal test by which it can be absolutely determined whether a particular article is a fix-

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FIXTURES—Cont.

ture. A thing should be regarded as real or personal property, according to the intention of the owner, its relation to, and its connection in use with, the freehold, rather than from the manner in which connection with the freehold is accomplished.

It is not necessary that the thing should be actually attached to the land to make it a part thereof.—*Booth v. Central Bank*, 519.

Rolling Stock of a Railway, and other like property, is generally regarded as a fixture, though in exceptional cases it may be treated as personalty.—*Id.*

Mortgage of Railway—Carries Rolling Stock. Where the law permits a railway company to mortgage its franchises and property as an entirety, a mortgage thereof in conformity with the statute governing mortgages of real estate, and duly recorded, creates a valid lien, though the statutes regulating chattel mortgages, and the creation of liens upon chattel property are disregarded.

Sec. 110 of the General Laws subdiv. 7 (Rev. Stat. 5411,) construed in connection with the provisions of sec. 62, p. 138 of Rev. Stat. 1868 and sec. 5523, 5524, 5768, 5769, 5771 of Rev. Stat. 1908, grants to such corporations the power to mortgage the corporate property as an entirety.—*Id.*

FRAUD.

Sale—Innocent False Representations of the Seller, material to the transaction, and inducing the purchase, bind him in equity even though he was not guilty of intentional fraud.—*Lathrop v. Maddux*, 258.

False Representations as of One's Own Knowledge, as to matters of which the party is ignorant, the law imputes a fraudulent intent. —*Id.*

Who May Complain. Action upon a contract by several plaintiffs. Fraudulent representations on the part of some of the plaintiffs, made at the instance of the defendant, and inducing the others to enter into the contract, is no defense to the action.—*Denver Co. v. Schafer*, 376.

FRAUDULENT CONVEYANCES.

Who is a Creditor. One who has sustained a personal injury by the negligence or misconduct of another is a creditor of the offending party, within the meaning of Rev. Stat. Sec. 2671, even though his claim has not been reduced to judgment.—*Thuringer v. Trafton*, 250.

Statute Construed. Section 2665 of the Revised Statutes relates to personal property exclusively.—*Ohio &c. Co. v. Barr*, 116.

Under Rev. Stat. Sec. 2674 the question of fraudulent intent is one of fact. Although it appeared by the pleadings that the grantor

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FRAUDULENT CONVEYANCES—Cont.
in the alleged fraudulent conveyance reserved to herself a beneficial interest in the property, it was held that the conveyance was not to be adjudged fraudulent in law.—*Id.*

Creditor's Bill—Requisites. A bill brought by one who at execution sale has purchased lands of his debtor, to vacate a previous conveyance by the debtor, as fraudulent, must, as against the alleged grantee in fraud, affirmatively allege the insolvency of the debtor, or that he had no other property than the lands in question from which the judgment might have been satisfied.—*Eppich v. Blanchard*, 139.

GENERAL ASSEMBLY.

Call for Special Session, Construed. The call for the special session of the general assembly of 1902 specified, among other subjects to which the assembly were required to direct their attention (1) To enact a revenue law providing for the assessment of property for taxation, and the levy and collection of taxes. (3) To enact any and all legislation relating to or in any wise affecting corporations. *Held* that the provisions of chapter 3 of the laws of that session imposing a special license tax upon certain corporations, and a penalty for its non-payment, was within the call, following *Parsons v. People*, 32 Colo. 221.—*Pinnacle Co. v. People*, 86.

GIFT.

Gift inter vivos. Of Corporate Stock, does not require endorsement of the certificate in order to its validity.—*Grimes v. Barndollar*, 421.

Evidence. Oral declarations, e. g. "I have given all my stocks," to a party named, justifies the conclusion that the donee is entitled to all corporate stocks owned by the donor at the time of the declaration.—*Id.*

HOMESTEAD EXEMPTION.

Federal Statute. The sale of lands entered as a homestead, under execution against the patentee, upon a judgment recovered for a debt contracted prior to the issuance of the patent, is void.—*Scott v. Stutheit*, 540.

HUSBAND AND WIFE.

Conveyances Between—Presumptions. Where a debtor conveys lands to his wife when he is insolvent, or by the transfer is made insolvent, and the conveyance is assailed by a creditor, the husband and wife have the burden to establish by a clear and satisfactory proof that the conveyance was for a valuable consideration, and with-

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HUSBAND AND WIFE—Cont.
out intent to hinder, delay or defraud the creditors. General statements of the wife that her money purchased the land in question, without reference to any record or source of information by which they may be verified, will not suffice. As against a creditor the law will not uphold a conveyance by an indebted husband to his wife, where the transaction is shrouded in mystery and doubt. The evidence examined and held entirely insufficient to support the conveyance.—*Thuringer v. Trafton*, 250.

Separation Agreement, does not deprive the wife of her right to the separate allowance provided by Rev. Stat. Sec. 7223, where such agreement contains no express renunciation thereof.—*Deeble v. Alerton*, 166.

The right of the widow cannot be taken away by presumption or construction.—*Id.*

Semble, a common law marriage entitles the widow to the allowance.—*Id.*

INJUNCTION.

Preliminary—Emergency. Two judges of the district court had passed upon the alleged emergency upon which a preliminary injunction was awarded. On appeal the court declined to review their action.—*Bivens v. Hull*, 338.

INSTRUCTIONS.

As to Collateral Matter not in Issue, tending to mislead and confuse the jury, disapproved.—*Colorado Capital Co. v. Chatfield*, 161.

Erroneous—Presumption. No presumption will be indulged that the jury evolved a correct rule from an erroneous instruction.—*Colorado Springs Co. v. Engle*, 352.

Construed. Action for an injury attributed to negligence in the operation of a street car. The jury were told by one instruction that if the motor-man failed to stop his car, after, by reasonable care, he could have discovered plaintiff "near or upon the track." Another point of the charge declared it to be the duty of one about to cross the tracks of a street railway, to exercise such care as a reasonably prudent person would, under like conditions. Still another instruction recited conditions under which the plaintiff must fail, referring to plaintiff, when she "stepped upon the track in front of" the car, or "was about to do so." *Held* that the latter instructions had not the effect to impose upon the phrase "near or upon the track," in the first, the sense of "dangerously near, or in a position of peril." Hill and Teller, JJ., dissented.—*Colorado Springs Co. v. Engle*, 352.

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INTERVENTION.

Parties. One sued in his individual capacity may intervene in a representative capacity.—*Grimes v. Barndollar*, 432.

Effect. Defendants erroneously sued in their personal capacity intervene as administrators. *Held* that though not liable personally, the cause should proceed against them as administrators.—*Grimes v. Barndollar*, 432.

Effect—Pleading Thereto. Action against administrators, personally, for the value of certain corporate stock. They intervened in their representative capacity. The heirs also intervened, praying that the stock be decreed to them. *Held* that plaintiff was entitled to answer the intervention petitions precisely as if the same matter had been presented in an original complaint, even although this presented equitable questions; that this was expressly allowed by Sec. 23 of the Revised Code; and that the action should proceed to a final decree upon the issues made by the petitions, and plaintiff's cross-complaint thereto.—*Grimes v. Barndollar*, 421.

JUDGMENTS.

Relate to Pronouncement. The formal entry of a decree is a purely clerical matter. Whenever done in conformity with the original pronouncement it relates back thereto, and it is not improper to expressly declare that it is done as of such former date.—*Harrington v. Harrington*, 154.

JUDICIAL SALES.

Defined. Is one made under the process of a court having authority to order it. The court is the vendor, and the officer conducting the sale is the mere agent of the court.—*Union Trading Co. v. Drach*, 550.

Caveat Emptor, applies to judicial sales.—*Id.*

JUSTICE OF THE PEACE.

Jurisdiction—Waiver of Defect. Prosecution under Rev. Stat. Sec. 1910. The Justice issued a warrant for the arrest of the accused before the complaint was filed, and appointed the trial for a day more than ten days in the future. The accused being convicted, appealed to the county court and went to trial there on the merits. The appeal to, and trial on the merits in the county court waived the defects in the procedure before the Justice, who had jurisdiction of the subject-matter.—*McCausland v. People*, 303.

A justice of the peace may entertain jurisdiction of an action upon a promissory note specifically payable at a place within his precinct, though defendant resides in a different precinct.—*Cort-Hames Co. v. Hanlon*, 337.

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LIENS.

Equitable Lien—When Allowed. One who having entered into an agreement with an agent for the purchase of the lands of his principal, submits to the repudiation thereof by the principal, and, treating the contract as broken, abandons his right to consummate the purchase, is not entitled to an equitable lien for the damages occasioned by the loss of his bargain, or moneys expended by him in preparing before the repudiation of the contract, to perform it, even though the principal has no property except the lands, and is proposing and attempting to dispose thereof.—*Lewis v. Weitbrec*, 147.

LIMITATIONS.

Action by State for Penalty. An action by the State against a private corporation to recover the penalty prescribed by statute for the non-payment of a tax is not within Rev. Stat. Sec. 4068, barring an action for a penalty begun more than a year after the offense is committed.—*Pinnacle Co. v. People*, 86.

Color of Title. A deed is color of title only to the premises described therein.—*Denver Co. v. Colorado &c. Co.*, 313.

Good Faith. One asserting a false claim of title under an absolute deed, in fact given as security, will not be heard to plead the seven years' statute of limitations (Rev. Stat. Sec. 4089, 4090).—*Hawkins v. Elston*, 400.

Evidence. Evidence of a claim barred by the Statute of Limitations held properly excluded.—*Macfaddin v. Bice*, 173.

MANDAMUS.

Judgment Upon the Pleadings, without hearing proofs is error.—*Parr v. Sexson*, 56 Colo. 491, followed.—*Yellow Jacket District v. Wessells*, 246.

MASTER AND SERVANT.

Employers Liability Act—Construed. Under Sec. 1 of c. 67 of the Laws of 1901, the master was liable to a servant, for the neglects of a fellow servant, to the same extent as for his own neglects.

And the servant was not required to give notice of the injury, as prescribed by sec. 2 of c. 77 of the Laws of 1893. So much of the former act as required the notice is repealed by the latter, and the repeal is not negatived by the proviso to sec 2.—*Carlock v. Denver & Rio Grande Co.*, 55 Colo. 146 followed.—*Kett v. Colorado & Southern Co.*, 392.

Servant's Assumption of Risk. The doctrine of Assumption of Risk has no place under c. 67 of the Acts of 1891.—*Kett v. Colorado & Southern Co.*, 392.

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MASTER AND SERVANT—Cont.

Servant's Contributory Negligence—For the Jury, save in the clearest cases, where the facts are undisputed, and intelligent men can draw but one inference.—*Id.*

A switchman employed in the yard of a railway company, where trains and switch-engines are continually passing, is under duty, when walking upon the tracks, to exercise reasonable care for his own safety; but he has the right to assume that his fellow employes will exercise a like measure of care in the discharge of their duties. A switchman walking upon the tracks in the night-time looked behind him upon several occasions without discovering the approach of any danger, and was finally struck and injured by a locomotive moving backward, with neither light nor guard at the rear. The question of a servant's contributory negligence was for the jury.—*Id.*

MAXIMS.

Noscitor a sociis. It is a universal rule that where a general description is followed by one of greater particularity, the latter governs.—*Union Co. v. Drach*, 559.

MECHANICS LIENS.

Inception of Right to Lien—By Contract, or Estoppel. The inception of, or right to a lien under R. S. 1908 §§ 4025, 4027, grows out of contract; under R. S. 1908 § 4029, it arises from estoppel.—*Stewart v. Talbot*, 563.

Where allowed—Mechanics Liens are a creature of statute, and can be enforced only in cases within the statute and by those persons to whom the statute plainly gives the right.—*Grimm v. Yates*, 268.

To What the Lien Extends—Improvements by Tenant—Statute Construed. The lien given by § 4025 R. S. 1908, to mechanics, material men, etc., and persons performing labor or furnishing materials for the construction of any building, etc., upon the property upon which they have rendered service or bestowed labor, or for which they have furnished materials, etc., at the instance of the owner or any person acting by his authority or under him as agent, contractor or otherwise, for the value of such work, labor, services or materials, primarily extends only to the structure or improvement placed upon the land.—*Stewart v. Talbot*, 563.

By virtue of R. S. 1908, § 4027, the lien provided for by R. S. 1908, § 4025, may extend to the land upon which the structure or improvement is placed, but can attach only when the owner of such land has some ownership in the building or improvement, and acts affirmatively relative to its construction or repair.—*Id.*

The provision of § 4025 R. S. 1908, that "every person having charge of the construction * * * of any building * * * shall

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MECHANICS LIENS—Cont.

be held to be the agent of the owner," confers upon the person so in charge the character of statutory agent of the one erecting the structure or improvement, but does not constitute him the agent of the owner of the land upon which the improvement is placed.—*Id.*

The mere inclusion in a lease of a covenant to build does not of itself render the lessee either the agent or contractor of the lessor so as to bind the latter's interest with a lien. The improvement must be of such a character and extent, or made under such circumstances, as to show that it was made either by the lessor acting through the lessee as his agent, or as the joint undertaking of both, before the lessor's interest in the land can be bound.—*Id.*

Rule Applied. A lease was granted for the term of 99 years, and provided that the tenant should, at his own expense, erect and complete a building to cost not less than $150,000, and thereupon the building and improvements should at once become a part of the realty. The landlord took no part in the erection of the building, having nothing to say as to the architecture, plans, or material, and there was no allegation or proof that the rents reserved were greater than the reasonable value of the premises. The lease was recorded on the day succeeding its execution, and was brought to the attention of the party contracting with the tenant. *Held* that the estate of the landlord was not chargeable with the lien.—*Id.*

Lease—Construed—Presumption. The provisions in the lease, which was duly recorded, that nothing therein should authorize or employer the lessee or any person dealing with him to charge the fee, or any interest of the lessor therein, with any mechanic's lien or encumbrance of any kind, nullified and destroyed any presumption that the lessee was the agent of the lessor within the mechanic's lien laws, and constituted constructive notice to those subsequently acquiring an interest in the premises as to the power and authority of the lessee therein, and no lien could attach to the lessor's interest, not solely because of the stipulation in the lease forbidding it, but because the facts show that the lessee in making the improvements did not act as the agent of lessor, and the improvements were not made at the latter's instance.—*Id.*

MUSSER, C. J., concurred, but resting his conclusion solely upon the clause of the lease that nothing should authorize the lessee to charge any interest of the lessor in the demised premises with any lien or encumbrance. The lessee, his honor said, was not of the class mentioned in Rev. Stat. Sec. 4025; the agency of the lessee, if any existed, was created by the lease, and was, of course, subject to the limitations there set down; that those dealing with him, having notice of those limitations, must at their peril observe and keep within the limits of his authority; that the lien laws of this state do not render such a stipulation between lessor and lessee void or ineffective;

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MECHANICS LIENS—Cont.

any such legislation, if constitutional, which his honor seems to doubt must declare the prohibition by express words, or necessary implication.

As to the notice required by Rev. Stat. Sec. 4029, his honor said it could not be required as to anyone having already notice that the lessor's interest was not chargeable, and the record of the lease, authorized by Rev. Stat. Secs. 694, 707, was notice to all the world that the lessor's interest was not to be subjected to a lien, for any improvements made by the lessee.

Notice of Non-Liability from Land Owners—When Required. The purpose of Rev. Stat. Sec. 4029 is to require the land owner, where another in possession is making improvements not authorized by any agreement between them, to give notice to those performing the labor, or furnishing the material, that his interest is not to be subjected to any lien therefor. Where the work is such as is authorized by agreement between the land owner and the person at whose instance such work is performed, and is not such as entitles those performing it to a lien under the other provisions of the statute, the estate of the land owner does not become chargeable by his failure to give the notice.—*Grimm v. Yates*, 268.

Section 4029 R. S. 1908 applies only to the case of an improvement made without authority of the land owner, and where, after its progress comes to his knowledge, he fails to give notice to those engaged in the work, disclaiming liability. *Grimm v. Yates, ante* followed. *Shapleigh v. Hull*, 21 Colo. 419, distinguished.—*Stewart v. Talbot*, 563.

Work Upon Mines—At Instance of Lessee. Section 4028 of the Revised Statutes does not entitle those performing ordinary development work, at the instance of a lessee, merely in order to extract the ore which the mine contains, to a lien upon the estate of the lessor.—

A bond conditioned for the conveyance of a mine recited that the obligee should be entitled to immediate possession, should commence work on the premises by a day named, "and work the same continuously, in a thorough and workmanlike manner," depositing in a specified bank, to the credit of the obligee, a certain percentage of the values extracted, "all shaft work * * * to be substantially timbered * * * and all drifts where reasonably necessary." The work done by the obligee was that usually performed for extracting ores. *Held* that, as against the mine owner those performing the work were not entitled to a lien under this section of the statute. *Pike v. Empfield*, 21 Col. Ap. 161, and *Clark Co. v. Centennial Co.*, 22 Col. Ap. 174, distinguished.—*Grimm v. Yates*, 268.

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MORTGAGE.

Deed Absolute for Securing Money, is a mortgage. The grantee has a lien, but no estate.—*Hawkins v. Elston*, 400.

Hall exchanged lands in Colorado with Elston, for properties in Missouri, which were encumbered to Wood; and at Elston's instance, Wood consenting, the lands in Colorado were conveyed to Wood, who thereupon executed a lease to Elston, with a covenant to convey, upon the payment of the moneys owing by Elston. *Held*, in effect, a mortgage of the lands in Colorado by Elston to Wood.—*Id.*

Absolute Deed, with or without a contemporaneous agreement of sale, is presumed to be, in fact, what it appears to be. He who asserts that it was intended as a mortgage must show by clear and convincing evidence that this was the intention.—*Id.*

Conveyance Absolute As—Contract Barring Mortgagor's Equity. Lands were conveyed as security for indebtedness. A contemporaneous contract provided that if the indebtedness should not be paid at or before its maturity, the land should remain the property of the mortgagees, and the mortgagors should be entitled to a certain credit. *Held* that the mortgagor insisting that the creditor should accept the lands, and allow the credit, the mortgagees were not to be heard to contend that the provision for thus barring the equity of redemption was invalid; that the mortgagor insisting upon the mortgagees' acceptance of the land, according to his contract was estopped to afterwards deny their title.—*Gibbs v. Wallace*, 364.

Surrender of Possession by Mortgagor, to mortgagee does not of itself, extinguish the mortgagor's estate, or the mortgage debt.—*Hawkins v. Elston*, 400.

Assignment. Wood, holding the legal title to lands as security for money, conveyed them, without consideration, to Hawkins, instructing him to collect the mortgage indebtedness by sale of the land, compensate himself for his trouble, and pay one-third of the residue of the mortgage money to each of persons named. *Held* an assignment of the mortgage debt.—*Hawkins v. Elston*, 400.

Account. Lands were conveyed by deed absolute, as security, with an agreement that if the indebtedness should not be paid at or before its maturity, the mortgagee should retain the title, allowing a certain credit. The conveyance contained a covenant against incumbrances, except a certain mortgage.

The mortgagors were held entitled to a credit for interest paid by them upon the mortgage recited, which had accrued prior to the date of the conveyance; also for taxes paid upon the lands and upon other lands included in the security; and it appearing that there was a second mortgage not mentioned in the conveyance or accompanying contract, they were held entitled to an allowance for payments made on account thereof, with interest upon each payment from the date thereof.—*Gibbs v. Wallace*, 364.

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NEGLIGENCE.

Examples. A track repairer, engaged in repairing track, was run down and seriously injured by defendant's train. The train was running slowly and might have been stopped within twenty-five or thirty feet. There was evidence that the bell was not rung, nor the whistle sounded, that the track repairer was in plain view, but that the engineer was looking to the rear of his train. *Held* that the evidence was sufficient to convict the railway company of negligence, and that the question should have been left to the jury.—*Sagara v. Chicago &c. Co.*, 236.

Not Contributing to the Injury, is not actionable, e. g. the failure of the proprietor of a coal mine to provide the metal tube prescribed by Rev. Stat. Sec. 640, where this omission had nothing to do with the injury complained of.—*Colorado Capital Co. v. Chatfield*, 161.

NEW TRIAL.

Excessive Verdict—Remittitur—Effect. Plaintiff's voluntary remittitur of three hundred and fifty dollars from a verdict of one thousand dollars warranted, by the evidence, has not the effect to entitle defendant to a new trial.—*Craghead v. McCullough*, 485.

PARTIES.

Who is a Party. One who applies in the county court for a modification of an order of distribution of a decedent's estate, thereby becomes party to the administration proceeding.—*Oles v. Macky's Estate*, 295.

Plaintiff—Contract of Third Person. In *Grimes v. Barndollar*, 421, specific performance was allowed of a contract to which plaintiff was not a party.

Heirs Suing Upon Gift to Ancestor. Wood held title to lands as security for money owing him by Elston, and conveyed the lands to Hawkins, without consideration, and with directions to collect the amount due him, by sale of the lands and pay one-third thereof to Elston. Hawkins still holding the title Wood died and his estate was settled. Elston's heirs were allowed to maintain an action upon this transaction, in their own names.—*Hawkins v. Elston*, 400.

Necessary Defendants. Upon bill to vacate a conveyance of lands as fraudulent one alleged to have an interest as beneficiary in a trust under the conveyance, is a necessary party.—*Eppich v. Blanchard*, 140.

Plaintiff claiming to be entitled to the waters of a certain stream, for storage, between certain dates, brought an action to restrain the officials of the water service from enforcing an order of the Division Engineer which required the Water Commissioner of the district to cease the storing of water, during the same period. *Held* that the appropriators for direct irrigation in other districts of the division

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PARTIES—Cont.
would, of necessity, be affected by the decree and were indispensable parties.—*Comstock v. Larimer and Weld Co.*, 186.

Mandamus to compel the directors of an Irrigation District to deliver certain warrants of the district, to which the plaintiff claims to be entitled, must join the district.—*Yellow Jacket District v. Wessells*, 240.

A contract of directors of a corporation contemplating and requiring corporate action cannot be enforced in an action to which the corporation is not party.—*Bivens v. Hull*, 339.

PARTNERSHIP.

Wherein Consists—Evidence. A partnership may be formed without intending it. Where the parties agree upon an arrangement which is, in law, a partnership, it is of no importance that they do not intend to form a partnership, or that they call it something else. Names go for nothing were inapplicable to the substance of the arrangement.

McDougall and McClelland bargained for the purchase of a smelter site with a dump thereon containing values, $2,000 to be paid in cash, and the residue in annual installments of $1,000 each. Being without means they arranged with Keely and Ross-Lewin, officers of the bank, that the bank should lend them the $2,000 required for the first payment, Keely and Ross-Lewin guaranteeing the loan, and receiving in consideration of the guarantee one-half the profits of the operation of the dump. Accordingly the $2,000 advanced by the bank was applied to discharge the first payment for the dump, McDougall and McClelland executing their notes for the deferred installments, the premises were conveyed to McDougall, and by him to Keely and the dump was operated for several years by McDougall and McClelland under the name of the Union Dump Co. Keely acted as treasurer of this company. All proceeds of the dump were deposited in the bank of which Keely was an officer, and all payments were made therefrom by checks, signed by McDougall and McClelland, and by Keely as treasurer. From the profits of the enterprise the note to the bank was discharged, also two installments of the purchase money, and upon checks signed by Keely, each of the associates received over $1,500. Upon the books of the Dump Co., the property was carried as an asset, and the deferred installments of the purchase money as Bills Payable. *Held* that the transaction created a partnership and that Keely was liable for the unpaid installment of the purchase money.—*Richardson v. Keely*, 47.

Individual Obligation of Partner, for a Partnership Liability, accepted without notice of the partnership, binds the firm.—*Richardson v. Keely*, 47.

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PARTNERSHIP—Cont.

Liability of Partners. The law presumes that the partners bear the losses of the enterprise, in the same proportion, in which they share the profits.—*Richardson v. Keely*, 55.

PENALTY.

Defined. An exaction prescribed by statute for the non-payment of a tax, is not a penalty, but an augmentation of the tax.—*Pinnacle Co. v. People*, 94, 95.

PASSENGER CARRIER.

Baggage—Liability of Carrier. So long as a railway company has charge of the baggage of the passenger as a common carrier, it is liable as an insurer. It is its duty to have the baggage ready for delivery within a reasonable time after it reaches destination.—*Denver &c. Co. v. Doyle*, 327.

If the passenger fails to call for it within a reasonable time it is the duty of the carrier to store it in some suitable place; thereafter it is liable for its loss, only in case it is convicted of negligence occasioning the loss.—*Id.*

On the afternoon of August 15th a valise arrived at a day station where there were few arrivals, and the station house was closed during the night. The valise not being called for was stored in the baggage-room of the station, a substantial building, the doors and windows of which were equipped with ordinary locks, all which were securely fastened on the occasion in question. During the night of the 16th, the building was entered by burglars, and the valise carried away. No sufficient excuse was shown for the passenger's failure to call for the baggage before the loss. *Held* the railway company were not liable.—*Id.*

The time within which the passenger should call for his baggage is measured from its arrival, not that of the passenger, at destination. —*Id.*

Duty of Passenger. Ordinarily it is presumed that the passenger and his baggage will go by the same train. If he travels by a later train and for that reason is delayed beyond a reasonable time in removing his baggage, it seems he must show a sufficient reason for his conduct. (331)

A lady in feeble health, intending to travel at a season when, as she must have been aware, she might have difficulty in procuring accommodation upon the sleeper, went to the station only a few minutes before train-time. She first checked her baggage, and then applied for a berth in the sleeper. Not being able to secure it she postponed her journey, permitting her baggage to go forward, upon

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PASSENGER CARRIER—Cont.
the train upon which she had checked it. The baggage arrived at destination on the afternoon of the 15th, the lady not until the 17th. In the meantime, without fault of the railway company, the baggage was stolen. *Held* she had failed to excuse her omission to call for the baggage in reasonable time.—*Denver Co. v. Doyle*, 327.

PAYMENT.

Voluntary—Of Public Moneys, Unlawfully Made, though with full knowledge on the part of the public officials conniving at the payment, may be recovered.

The liability of the State Treasurer is no answer to the action.—*Farr v. People*, 483.

PHYSICIANS AND SURGEONS.

Negligence. To adopt for the reduction of a fracture the methods generally recognized by the profession as proper, is not negligence.—*Craghead v. McCullough*, 485.

Where a surgeon is employed to treat an injury the law implies, in the absence of any expres agreement, a contract on his part that he will use reasonable and ordinary care to accomplish the purpose of his employment.—*Id.*

The surgeon does not warrant a cure, and is not responsible for a failure not resulting from the omission, on his part, of ordinary care, or the want of ordinary skill.—*Id.*

The want of ordinary care is not established by the result alone, but must be shown by other evidence.—*Id.*

The evidence examined and held sufficient to charge the surgeon with a failure to use ordinary care.—*Id.*

PLEADINGS.

Complaint. The complaint upon a warranty of personalty, must show, not only the warranty, but substantial compliance with the conditions imposed by the contract, or facts excusing non-compliance.

The complaint counted upon the warranty of a stallion as a reasonably sure foal-getter. The contract of sale obligated the purchaser to proper feeding, etc., and other conditions. A complaint not showing compliance with these conditions nor excusing failure in that behalf states no cause of action.—*Denver Co. v. Schafer*, 370.

Complaint for the wrongful detention of flood water to which the plaintiff was entitled need not aver that, if not interrupted, the flood would have reached plaintiff, or would have been available to him. Injury to the plaintiff will be presumed, in the first instance, and

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PLEADINGS—Cont.
the burden is upon defendant to allege and prove the contrary.—*Greeley &c. Co. v. Farmer's Pawnee Co.*, 462.

Joinder of Causes of Action. A single action lies to recover from a corporation the annual license tax prescribed by statute for several years. Or several promissory notes.—*Pinnacle Co. v. People*, 80.

The Remedy for a Failure to Separately State Separate Causes of Action. Failure to separately state separate causes of action, is by motion, not a demurrer for misjoinder of causes of action.—*Pinnacle Co. v. People*, 86.

The denial of a motion to require the separate statement, is error.—*Ouray County v. San Juan Co.*, 69, 71.

New Cause of Action. The original complaint alleged the sale by plaintiff to defendant of an auto car, and that plaintiff, upon defendant's paying therefor on delivery, would accept in part payment a certain second hand car. An amended complaint made no allusion to the second hand car. The answer set forth the agreement as to this car, and claimed a credit therefor. An amended reply admitted the agreement, but alleged that it was upon condition that defendant should pay the residue of the purchase price of the car sold, by a certain day, and that this condition was not complied with.

In the same case the original reply admitted a defect in the car sold, which plaintiff promptly replaced and corrected. The amended replication omitted this admission and averred that the car sold was perfect in all its parts.

The court declined to say, in either case, that the amendment stated a new cause of action, or was a departure.—*Kingsbury v. Vreeland*, 212.

Amendments—Discretion of the Court. Amendments, and the time they may be filed, are largely in the discretion of the trial court.—*Kingsbury v. Vreeland*, 212.

The refusal to permit plaintiff to set up, more than a year after the institution of the action, a new ground for the relief which he demands is not an abuse of discretion.—*Cheney v. Bierkamp*, 319.

Complaint seeking to charge certain lands with a trust. It appearing that the defendant had exchanged portions of the lands for others, receiving boot money, *Held* proper to allow an amendment praying the imposition of the trust upon the lands received in the exchange, and that defendants account for the moneys received in the exchange.—*Hawkins v. Elston*, 400.

Motion for Judgment Upon. On plaintiff's motion for judgment on the pleadings the averments of the answer are taken as true, and if these raise a material issue of fact the motion must be denied. The motion cannot be made to serve the purpose of a general demurrer. *Benson v. Hoover* 3 Col. Ap. 467, *Rensberger v. Britton* 31 Colo. 77, *Borcherdt v. Favor* 16 Col. Ap. 406, distinguished.—*Eppich v. Blanchard*, 140.

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PLEADINGS—Cont.

Judgment upon the pleadings is not to be granted when the defect complained of is one which may be cured by amendment.—*Kingsbury v. Vreeland*, 212.

Impertinence. That portions of a pleading are impertinent or irrelevant is no ground to strike out the whole pleading.—*Yellow Jacket District v. Wessels*, 246.

Construed. The complaint, of a reservoir company, filed in October, set forth that plaintiff was entitled by certain adjudication decrees to divert water from the Cache la Poudre River, in Water District No. 3, for storage; that large volumes of water were passing the head-gate of its inlet canal; that the water was not needed for direct irrigation, either in District No. 3 or elsewhere; but that the official defendants, the State Engineer, the Division Engineer, and the Water Commissioner, under an order of the Division Engineer promulgated in the preceding May and reiterated on the first of September, were refusing to permit plaintiff to divert water from the stream for storage; that in Water District No. 3, for more than twenty years, the use of water for direct irrigation terminated about the 15th of September in each year, and all rights of appropriators for any purpose other than storage ceased and determined at the date named, until the following April; that the acts of the defendants were unlawful, unwarranted, and in violation of plaintiff's decreed rights; that the order complained of was uncalled for, and an assumption on the part of defendant officials, of an authority not conferred upon them by law, and that the use of water contemplated by the order would be mere waste, and contrary to law; praying an injunction to restrain these officials from enforcing the order in question, and for a decree that in Water District No. 3 the period for direct irrigation commences upon April 15th in each year, and extends to September 15th, and the period for storage of water commences on the 15th of September in each year, extending to April 15th of the following year. *Held* that the object of the action was to obtain the relief demanded by the special prayer, and not to suppress waste or promote economy in the use of water. *Held* further that the complaint failed to show, by any averment of fact that the water officials were acting beyond or contrary to the authority conferred upon them by law, or that the plaintiffs had any right superior to that of the appropriators for direct irrigation, in the same district.—*Comstock v. Larimer & Weld Co.*, 186.

The complaint alleged a purchase by plaintiff from defendant of a traction engine; that the purchase was induced by certain representations of defendant as to the capacity of the engine, which were relied upon by plaintiff; the falsity of these representations, the entire insufficiency of the machine, its return by plaintiff and receipt and detention by defendant, and prayed judgment for the return of the moneys paid by plaintiff on account of the purchase, and the

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PLEADINGS—Cont.
cancellation of certain promissory notes executed by him for part of the purchase price. *Held* an equitable action for rescission of the contract.—*Lathrop v. Maddux*, 258.

A complaint setting forth (1) The establishment of a county line by the State Engineer, and that the plaintiff county is dissatisfied therewith, (2) The long recognition by both counties and the inhabitants and officials thereof, of the particular line for which the plaintiff contends, contains two separate causes of action, one the action authorized by the statute, and the other an attempt to set up an estoppel.—*Ouray County v. San Juan County*, 69.

The complaint of the Attorney General filed in May, 1910, demanded of the defendant corporation, in one count, the license tax for seven successive years, and the penalty prescribed by law for the non-payment of the tax. *Held* that the tax for each year, and the penalty thereon, constituted a separate cause of action.—*Pinnacle Co. v. People*, 86.

The complaint alleging that Wood, holding the legal title to certain lands as security for money, had conveyed them to defendant, without consideration, and with directions to sell the land and pay plaintiffs' ancestor one-third of the moneys due Wood, that defendant had long been in possession receiving the rents and profits, which exceeded the interest on the mortgage indebtedness and his outgoes for taxes and the like, prayed an account of the profits of the lands, and that they be permitted to pay defendant the balance of the mortgage indebtedness, and have title to the premises vested in them, *Held* to disclose an offer to pay defendant whatever should be found due him upon the account.—*Hawkins v. Elston*, 400.

Special Demurrer, not containing the specification of causes required by the code (Sec. 57), will be treated as a general demurrer. *Hawkins v. Elston*, 400.

Irrelevant Answer, may be stricken from the files on motion. Rev. Code Sec. 66.—*Lewis v. Weitbrec*, 147.

PRACTICE.

Change of Issues—Power of the Court. The court has no power to change an action for the rescission of a contract to an action for damages, without the consent of both parties.—*Cheney v. Bierkamp*, 319.

File Mark—Effect. The file mark upon an appeal bond is controlled by the record, where this shows that the bond was lodged and approved at an earlier date, and in due time.—*Catlin v. Vandegrift*, 289.

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Change of Venue. See *VENUE.*

PRECEDENTS.

The decisions of the courts of other states, construing their statutes for conferring a lien upon mechanics, are to be applied with caution.—*Stewart v. Talbot*, 563, 580.

PROCESS.

Service—Where the Sheriff is a Party. Rev. Stat. Sec. 1298 is mandatory. Where the sheriff is party to an action all process therein must be served by the coroner. A special panel of jurors summoned by the sheriff in such case, must be discharged on motion.—*General Film Co. v. McAfee*, 344.

PUBLIC OFFICER.

Liable for Public Moneys Unlawfully Received. The State Game and Fish Commissioner is liable to the people for moneys paid by the Treasurer to reimburse him the expense of journeys made without the state, in attending conventions; and this, although the money was paid upon the auditor's warrant, issued upon a voucher approved by the Governor.—*Farr v. The People*, 483.

The liability of the State Treasurer is no answer to the action. —*Id.*

PUBLIC UTILITIES.

Discriminations. A public service corporation is under duty to render equal service to all, without discrimination as to rates or facilities. Even a contract to render service to a particular patron, at a particular rate of compensation, valid when made, will not justify a continuance of the service at the agreed rate, when, subsequently a higher rate is *prescribed* to and exacted from the public.—*Wolverton v. Mountain States Co.*, 58.

Legislative Control. The rates exacted by a public service corporation are subject to legislative regulation.

The courts have no authority to prescribe rates for the service. —*Wolverton v. Telephone Co.*, 58.

RAILWAY COMPANY.

Duty as to Providing Sleeping Cars. It seems that a railway company is not under duty to provide sleeping car accommodations for its patrons. Where a traveler checks his baggage by a particular train, the time within which he must call for it, at its destination, is not extended, by his inability to secure a berth in the sleeping car upon the same train, even though, owing to sickness he is unable to travel

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RAILWAY COMPANY—Cont.
in the ordinary cars.—*Denver and Rio Grande Co. v. Doyle*, 327.

Duty Towards Trackmen. A railway company is under duty to provide that when a train approaches a gang of track repairers it shall give them a signal, in reasonable time, so that they may get out of its way.—*Sagara v. Chicago Co.*, 236.

Mortgage of Railway—Effect. A mortgage of a railway as an entirety, covers not only rolling stock, but rails, ties, spikes and all things brought upon the mortgaged property, and designed to be affixed to the realty; not fuel, oil and the like, designed for present consumption.—*Booth v. Central Savings Bank*, 519.

REPLEVIN.

Re-Delivery Bond, executed by defendant, who by force thereof, under the statute, has return of the goods, is not satisfied by the delivery and acceptance of part of the goods in damaged condition. —*Trindle v. Register Co.*, 81.

The whole of the chattels must be surrendered in like good order and condition as when replevined.—*Id.* 81, 85.

Dismissal of One Defendant, does not discharge the surety in the re-delivery bond.—*Id.* 81, 86.

Verdict. A verdict for the plaintiff fixing the total value of the goods, not valuing any item separately, is conclusive upon the defendant, and his surety in the redelivery bond.—*Trindle v. Register Co.*, 81.

SPECIAL PROCEEDINGS.

A proceeding by a county to correct errors of the State Engineer in establishing the boundaries thereof, is not a special proceeding but an action.—*Ouray County v. San Juan County*, 67.

SPECIFIC PERFORMANCE.

Revocable Contract. Equity never interferes to enforce a contract where the party sought to be charged has reserved to himself, or the law confers upon him, the right of revocation.

The contract of a public service corporation to render service to a particular patron at a particular rate for a specified time, is within the rule; because no public service corporation can lawfully enter into such a contract.—*Wolverton v. Mountain States Co.*, 64, 65.

Contract of Stockholders in Corporation for Increase of Stock. Two directors of a corporation, owning the majority of the stock outstanding, agreed with a broker that its stock should be increased, that a proportion of the increase should be awarded to one of the directors, without anything to be paid therefor, and another propor-

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SPECIFIC PERFORMANCE—Cont.

tion should be awarded to the broker in consideration of his procuring the sale of other shares, so as to produce a specified sum. Bill by the broker against the contracting directors, for specific performance. *Held* that inasmuch as to specifically enforce the contract would involve the coercion of the corporation to do what it had never agreed to do, and might be unwilling to do the relief must be denied.—*Bivens v. Hull*, 338.

Contract—Certainty—Consideration. The plaintiff claiming certain corporate stocks against the heirs and personal representatives of one Hall, relied upon a clause in an agreement between the heirs of Hall, which provided among other things that "the stocks and shares inventoried as belonging" to plaintiff, "shall be considered her property, and the certificate shall be delivered to her." Considering that the shares in question had at the decease of Hall been in possession of plaintiff, and had been by her delivered to the administrators, on their demand, but under protest and without waiver of any right, and had been inventoried with a statement of her claim and protest; that the agreement in question had for its purpose the adjustment of an action then pending between the heirs, involving the whole estate; that it resulted in the settlement of that controversy, and the disposition of the entire estate except the shares in question; that the heirs were represented by counsel who it was reasonable to assume were fully informed as to the details of plaintiff's claim; and that there were no other stocks in dispute, it was *held* that the agreement was not objectionable for uncertainty, and that the mutual covenants of the heirs was a sufficient consideration, moving to each.—*Grimes v. Barndollar*, 421.

Contract Between Third Persons. In the same case. *Held* that the circumstance that plaintiff was not a party to the agreement upon which she relied was no obstacle to its specific performance on her behalf.—*Id.*

STATUTES.

Construction. A statute is not to be so construed as to abridge the power of the owner of property to contract with reference thereto, where it is possible to avoid this result.—*Stewart v. Talbot*, 588, 593.

As to the constitutionality of such legislation. *Quaere.*—*Id.* 590, 593.

The Revenue Act is to be considered as a whole.—*Denver v. Hobb's Estate*, 220.

A statute the purpose of which is to give notice of an encumbrance upon personalty should receive the construction best calculated to accomplish this purpose.—*Stitt v. Spengel Co.*, 559.

Construed. Void, in a statute intended for the protection of a

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STATUTES—Cont.

particular class construed to mean voidable, and only at the instance of those of the protected class.—*Dillon v. Myers*, 492.

Repeals by Implication, are regarded with high disfavor, especially when the statute alleged to have been repealed was founded in experience, and grave considerations of public welfare.—*Harrington v. Harrington*, 154.

A statute without negative words will not repeal existing legislation unless there is an unavoidable repugnancy.—*Id.*

A statute enacted in 1887 allowed a writ of error at any time within three years from the date of the judgment (Rev. Code. Sec. 436). This statute remained in force, applicable to all manner of causes, until 1893. A statute enacted in that year limited the time for suing out a writ of error to review a decree of divorce to six months (Rev. Stat. Sec. 2123). By Sec. 8 c. 6 of the Laws of 1911, (an Act revising the law relating to appeals and writs of error,) it was again provided that "A writ of error shall not be sued out after the expiration of three years" from the date of the judgment, and all acts and parts of acts "inconsistent herewith" were repealed. *Held* the latter statute had not the effect to repeal Rev. Stat. Sec. 2123. —*Id.*

Foreign, have no effect upon transactions relating solely to lands situate in Colorado.—*Hawkins v. Elston*, 400.

STATUTES CONSTRUED, CITED OR REFERRED TO.

Revised Statutes		Sec..	515	*Stitt v. Spengel Co.*, 559.
"	"	"	526	*Russell v. Jordan*, 445.
"	"	"	529	*Id.*
"	"	"	694	*Stewart v. Talbot*, 603.
"	"	"	707	*Id.*
"	"	"	865	*Dillon v. Myers*, 492.
"	"	"	1162	*Ouray County v. San Juan County*, 67.
"	"	"	1298	*General Film Co. v. McAfee*, 344.
"	"	"	1539	*Catlin v. Vandegrift*, 289, 293.
"	"	"	1624	*Jabich v. People*, 175.
"	"	"	1628	*Id.*
"	"	"	1688	*Tashima v. People*, 98.
"	"	"	1910	*McCausland v. People*, 303.
"	"	"	2123	*Harrington v. Harrington*, 154.
"	"	"	2665	*Ohio &c. Co. v. Barr*, 116.
"	"	"	2671	*Thuringer v. Trafton*, 250.
"	"	"	2674	*Ohio &c. Co. v. Barr*, 116.
"	"	"	3609	*Id.*
"	"	"	3719	*Cort-Hames Co. v. Hanlon*, 337.
"	"	"	4025	*Stewart v. Talbot*, 563.

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STATUTES CONSTRUED, CITED OR REFERRED TO—Cont.

"	"	"	4027	*Id.*
"	"	"	4028	*Grimm v. Yates*, 268.
"	"	"	4029	*Stewart v. Talbot*, 563.
"	"	"	4068	*Pinnacle Co. v. People*, 86.
"	"	"	4089, 4090	*Hawkins v. Elston*, 400.
"	"	"	5411	*Booth v. Central Bank*, 519.
"	"	"	5523, 5524	*Id.*
"	"	"	5540	*Kendrick v. Twin Lakes Co.*, 281.
"	"	"	5687	*Denver v. Hobb's Estate*, 220.
"	"	"	5768, 5769	*Booth v. Central Bank*, 519.
"	"	"	5771	*Id.*
"	"	"	6975	*Jabich v. People*, 175.
"	"	"	7042	*Russell v. Jordan*, 445.
"	"	"	7209	*Catlin v. Vandegrift*, 289.
"	"	"	7111	*Deebles v. Alerton*, 166.
"	"	"	7223	*Id.*
Acts 1891	c.	67		*Kett v. Colorado &c. Co.*, 392.
" 1902	c.	3	§§ 64, 68	*Pinnacle Co. v. People*, 86.
" 1907	c.	211		*Id.*
" 1910	c.	4		*Election Commission v. People ex rel*, 105.
" 1911	c.	6		*Fort Collins Co. v. Larimer & Weld Co.*, 183.
" 1911	c.	6	§ 8	*Harrington v. Harrington*, 154.
Revised Code	Sec.		22, 23	*Grimes v. Barndollar*, 421.
"	"	"	27	*Denver Co. v. Schafer*, 376.
"	"	"	31	*Kingsbury v. Vreeland*, 212, *O'Rourke v. O'Rourke*, 300, *Greeley &c. Co. v. Farmer's &c. Co.*, 462.
"	"	"	32	*Ouray County v. San Juan County*, 69.
"	"	"	57	*Hawkins v. Elston*, 400.
"	"	"	66	*Lewis v. Weitbrec*, 147.
"	"	"	76	*Pinnacle Co. v. People*, 86.
"	"	"	89	*Trindle v. Register Co.*, 81.
"	"	"	236	*Craghead v. McCullough*, 485.
"	"	"	243	*Catlin v. Vandegrift*, 291, 292.
"	"	"	280	*Hawkins v. Elston*, 400.
"	"	"	344	*Yellow Jacket Directors v. Wessells*, 246.
"	"	"	436	*Harrington v. Harrington*, 154.

STREET RAILWAYS.

Care Required in Operation. One operating a street car, seeing a pedestrian near the track, but not in a position of peril, and not under circumstances warranting the apprehension on the part of a reasonably prudent person that she will presently be in peril, is not under duty to stop his car, even though there is time.—*Colorado Springs Co. v. Engle*, 352.

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SURVEYS.

Monuments. When the place at which the surveyor subdividing the public lands for the government placed a stone to mark a section corner can be ascertained, that point is the corner.—*Biddle v. Newman*, 243.

TAXATION.

Taxable Property—Stock in Foreign Corporation. Under Rev. Stat. Sec. 5687, shares in the capital stock of corporations, either domestic or foreign, except banking corporations, are not taxable.

The proviso to this section is not in conflict with sec. 6 of art. X of the constitution.—*Denver v. Hobbs Estate*, 220.

Works of Irrigating Company. A canal owned by mutual irrigating company, and used exclusively for irrigating the lands of the individual members of such corporation is exempt, under the constitution, from separate taxation.—*Kendrick v. Twin Lakes Co.*, 281.

The head-gates of such canal are parts thereof, and are likewise exempt.—*Id.*

So a dam, which is part of the works by which water is collected and diverted.—*Id.*

Such works are not to be regarded as improvements to the land upon which they are situate.—*Id.*

Water Rights, under Rev. Stat. Sec. 5540 are, for the purposes of taxation, part of the real estate upon which the water is applied. —*Id.*

TAX TITLES.

Tax Deed, does not pass title to premises not within the description.—*Denver Co. v. Colorado & Southern Ry. Co.*, 313.

Void Tax Sale—Right to Redemption Money. Where one while under no obligation or duty to the mortgagee to pay the taxes acquires a tax title, the mere taking afterwards of a quit-claim deed to the land from the mortgagor does not destroy or defeat the tax title, or, should it be declared void, the right to the redemption money.—*Gibson v. Woods*, 544.

TELEPHONE COMPANIES.

Duty to the Public. Telephone companies are under duty to extend to all their patrons the same service, and at the same rates where the conditions are the same.

Every citizen of the community where such a company operates is entitled to have a telephone instrument installed in his premises, and to receive the same service, at the same rates as others, under similar conditions; and this right does not depend upon contract, but

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TELEPHONE COMPANIES—Cont.
upon the fact that the company is a public service corporation, and owes the same service, at the same reasonable rate, to every member of the community.—*Wolverton v. Mountain States Co.*, 58.

House Service—Business Service. There is a difference in the value of the telephone service rendered to premises occupied merely as a residence, and premises occupied for business, and a reasonable difference may be made in the rate charged. A contract to render telephone service to a residence will not entitle the citizen to the installation of an instrument in a new place of residence, where it is to be devoted to carrying on business.—*Id.* 62, 63.

TENDER.

When must be Pleaded. The complaint alleging that defendant, holding the legal title to lands, in fact as security for money, had repudiated the trust and asserted absolute title, praying an account, and a decree for a conveyance, upon payment of whatever might appear to be due, *semble* it need not allege a tender or offer to pay.—*Hawkins v. Elston*, 400.

Excessive—Effect. Tender of more than the amount of the debt stops interest from the date of the tender.—*Gibbs v. Wallace*, 364.

TRIALS.

Change of Issues, not allowed save by consent of both parties.—*Cheney v. Bierkamp*, 319.

Questions for the Court. Where the facts are not disputed what constitutes reasonable time is for the court.—*Denver Co. v. Doyle*, 327.

TROVER.

Date of Conversion. Corporate stocks held converted at the date when demand of one entitled to immediate possession is refused.—*Grimes v. Barndollar*, 421.

TRUSTS.

Following Trust Property. Equity permits the beneficiary to follow the trust property into new investments.—*Hawkins v. Elston*, 400.

Statute of Uses—Operation. The statute of uses has no effect upon implied, resulting, or constructive trusts, but solely upon dry, naked or passive trusts created by the parties, and disclosed by the terms of the conveyance. It has no application to a conveyance which transfers land to parties designated as trustees, but in which the trust

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TRUSTS—Cont.

is not defined, nor the beneficiary named.—*Ohio &c. Co. v. Barr*, 116.

Teller v. Hill 18 Col. Ap. 509, distinguished.—*Id.*

And the statute has not the effect to vest title in one having a contingent interest, dependent upon a condition never performed.—*Id.*

VENDOR AND VENDEE.

Remedies of Vendee. When the vendor fails to perform a substantial covenant on his part the vendee may rescind and recover damages, or may affirm the contract and sue for the damages occasioned by the vendor's failure to perform.—*Cheney v. Bierkamp*, 319.

These remedies are inconsistent, and where the vendee has made his election he must stand or fall by the position so first assumed.—*Id.*

Vendee is not allowed to rescind for nonperformance by the vendor of a non-essential agreement, for the default in which he may be compensated in damages.—*Cheney v. Bierkamp*, 319.

VERDICT.

General verdict upon two counts, one stating no cause of action, the judgment must be reversed.—*Denver Co. v. Schafer*, 376.

VENUE.

Change of Venue—Waiver. The right to change the venue of an action brought in a county other than that prescribed by the statute is a mere personal privilege, and ordinarily is considered as waived by a general appearance and an answer to the merits; or if the application is not interposed in apt time. (214)

Summons was served on defendant on July 2nd; August 15th he filed a demurrer to the complaint; November 5th an amended complaint was filed; on the 11th of January following defendant filed his answer thereto and on March 30th, his motion for a change of venue. *Held* not in apt time.—*Kingsbury v. Vreeland*, 212.

A defendant who after the erroneous denial of her motion for a change of venue voluntarily answers, and proceeds to trial without objection, waives her right to the change.—*O'Rourke v. O'Rourke*, 360.

Place of Performance of Contract—Action for Tort. Action for the breach of the warranty of a stallion as a sure foal-getter. The warranty was upon certain conditions as to the manner of feeding and handling by the purchaser, the class of mares to which a stallion should be bred, and monthly reports to the seller of the names of the mares, with the name and address of the owners. Fraudulent misrepresentations inducing the purchase were alleged. Plaintiffs were farmers residing at the County of Lincoln. *Held* that under Sec. 27 of the code, the action was properly brought in the County of Lincoln,

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VENUE—Cont.
both because that was the county where the contract was to be performed, and because of the character of the action as one of tort; and that defendant was not entitled as of right, to change the venue to the county of its residence.—*Denver Co. v. Schafer*, 376.

Defendant answering and going to trial on the merits waives any error committed in denying his application for a change of the venue.—*Greeley &c. Co. v. Farmers Pawnee Co.*, 462.

WAIVER.

A motion to dismiss a writ of error, because not sued out in time, is not waived by a previous motion in the court of appeals to remand the cause to the Supreme Court.—*Harrington v. Harrington*, 37.

The right to change the venue of an action brought in a county other than that prescribed by the statute is a mere personal privilege, and ordinarily is considered as waived by a general appearance and an answer to the merits; or if the application is not interposed in apt time.—*Kingsbury v. Vreeland*, 212.

A defendant who after the erroneous denial of her motion for a change of venue voluntarily answers, and proceeds to trial without objection, waives her right to the change.—*O'Rourke v. O'Rourke*, 300, *Greeley &c. Co. v. Farmer's &c. Co.*, 462.

Prosecution under Rev. Stat. Sec. 1910. The Justice issued a warrant for the arrest of the accused before the complaint was filed, and appointed the trial for a day more than ten days in the future. The accused being convicted, appealed to the county court and went to trial there on the merits. The appeal to, and trial on the merits in the county court waived the defects in the procedure before the Justice, who had jurisdiction of the subject-matter.—*McCausland v. People*, 303.

Action to rescind a contract. The court, against the objections and exceptions of both parties ordered plaintiff to file a complaint demanding damages in lieu of rescission. Plaintiff, protesting and expressly reserving all rights, complied with the rule. *Held* that he waived no right.—*Cheney v. Bierkamp*, 319.

WATER RIGHTS.

The Right to the Use of Water, depends upon the needs of the appropriator. He is not permitted to apply water to his land unnecessarily, or in such volume as to amount to waste.

In this respect the law makes no distinction between appropriators for irrigation, for domestic use, or for power. As to all these purposes, where a valid appropriation is made, the right is limited only by the law of necessity.—*Comstock v. Larimer and Weld Co.*, 186.

Storing Water Without Appropriation for Storage. The senior

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WATER RIGHTS—Cont.
appropriator whose only right is for direct irrigation may not store flood water, even temporarily, when it is needed by a junior appropriator below him, and this even though his ditch is temporarily in such condition that to turn the flood water into it would have caused it to break and overflow.—*Greeley & Loveland Co. v. Farmers Pawnee Co.*, 462.

Change of Use. An adjudication for direct irrigation does not entitle the appropriator to store water for future irrigation, when it is needed by a junior appropriator below.—*Greeley & Loveland Co. v. Farmers Pawnee Co.*, 462.

Change of Point of Diversion—Review of Decree. Under c. 6 of the Laws of 1911, a decree allowing a change in the point of diversion of water is to be reviewed by writ of error.—*Fort Collins &c. Co. v. Larimer & Weld Co.*, 183.

Irrigating and Non-Irrigating Seasons. The division of the year into two distinct seasons, during one of which the waters of a certain district are to be used for direct irrigation, and during the other of which they are to be stored, is in conflict with statutory provisions regulating the distribution of water, and with the thoroughly established doctrine that preference to the use of water depends upon prior appropriation, and the necessities of the consumer.—*Comstock v. Larimer & Weld Co.*, 186.

Where decrees have established the right and priority of appropriators for irrigation, or other purpose, without limitation as to the time of use, the courts have no power to invade the right so conferred, by prescribing times and seasons during which it shall be enjoyed.—*Id.*

The inconveniences, difficulties and controversies which must result from any such division of the year, enlarged upon.—*Id.*

Distribution of Water, is to be made throughout the irrigation division, according to priorities, and not for a single district.—*Comstock v. Larimer & Weld Co.*, 186.

Waste in the Use of Water, is to be restrained by proceedings against the offending parties only.—*Comstock v. Larimer & Weld Co.*, 186.

Adjudication of Priorities—Extent of Inquiry. In the statutory adjudication of priorities, the court is limited to an inquiry as to the volume of water to which the ditches are respectively entitled and their relative priorities. The title of a claimant to the conduit by which the water is diverted is not a matter for investigation or determination.—*Snyder v. Colorado Co.*, 516.

Custom—Unlawful. A custom established in a particular water district, that water shall be employed for direct irrigation only during a particular season of the year is contrary to statute and binds neither the water officials nor consumers from the same stream in other districts.—*Comstock v. Larimer & Weld Co.*, 186.

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WATER RIGHTS—Cont.

Pleadings in Controversies as to the Use of Water. Where one claiming the right to water for storage seeks to restrain its application to direct irrigation it is not sufficient to aver merely an appropriation for storage, and a decree establishing the right. The complaint must go further and show that the plaintiff's right is relatively prior to that asserted by those against whom the relief is sought.—*Comstock v. Larimer & Weld Co.*, 186.

WORDS AND PHRASES.

"Take a Flyer" means, if anything at all, to share in the proposition presented.—*Richardson v. Keely*, 47.

"Or," construed.—*Denver Co. v. Schafer*, 384.

"Creditor." One who has received a personal injury, by the misconduct of another, is a creditor of the culpable party within the meaning of the statute of frauds. (Rev. Stat. Sec. 2671)—*Thuringer v. Trafton*, 250.

"Clearly and Substantially," "Practically Incompatible," construed.—*Beeler v. People*, 451.

"Situated." The direction that a chattel mortgage shall be recorded, "where the property mortgaged shall be situated." (Rev. Stat. Sec. 515), means where the property is permanently situated.—*Stitt v. Spengel Co.*, 559.

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